UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THOMAS VILLEGAS and AMY VILLEGAS, Plaintiffs, v. MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency; MEG McCOLLISTER, in her official capacity as Administrator of the U.S. Environmental Protection Agency Region 7; and DAVID COZAD, in his official capacity as Director of the Enforcement and Compliance Assurance Division of the U.S. Environmental Protection Agency Region 7, Defendants.	No. ______________________ **COMPLAINT** Trial Requested In: Kansas City, KS

INTRODUCTION

1. An official of the United States Environmental Protection Agency (EPA) has initiated an administrative adjudication against Plaintiffs Tom and Amy Villegas, seeking monetary penalties for an alleged violation of the Clean Water Act. That same official, who works in Kansas, also issued a compliance order against the Villegases requiring them to conduct improvements on their property.

2. Plaintiffs seek declaratory and injunctive relief against the administrative adjudication under the Appointments Clause and Article III of the Constitution, as well as declaratory and injunctive relief against the compliance order under the Appointments Clause.

3. The adjudication has been assigned to Susan Biro, an EPA employee, in her capacity as an administrative law judge ("ALJ"), but she was never appointed as an ALJ under the Appointments Clause, which provides the exclusive method of filling ALJ positions. The employee therefore lacks the authority to preside over the adjudication.

4. Separately, the claim against the Villegases may be adjudicated only in a court constituted under Article III of the Constitution, both because the claim seeks to deprive the Villegases of their private rights in their money and in reasonable use of their real property, and because the Villegases are entitled to an impartial and independent adjudication of the claim.

5. The compliance order was issued by David Cozad, an EPA employee, in his capacity as Director of Enforcement and Compliance Assurance for EPA's Region 7. Mr. Cozad, through the compliance order, concluded that the Villegases had violated the Clean Water Act and required them to conduct extensive and costly improvements on their property.

6. Mr. Cozad, however, was not appointed as Director pursuant to the Appointments Clause and therefore lacked the powers of the Director, including the power to issue the compliance order.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); *id*. § 2201 (authorizing declaratory relief); *id*. § 2202 (authorizing injunctive relief); and 5 U.S.C. § 702 (waiving the federal government's sovereign immunity for various non-monetary claims). *See also Axon Enter., Inc. v. FTC*, __ S. Ct. __, No. 21-86, 2023 WL 2938328 (Apr. 14, 2023) (holding that challenge to structure of FTC ALJs' offices and duties was entitled to immediate review in district court and that administrative adjudicatory scheme did not strip district courts of jurisdiction).

8. The Villegases possess "an implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause [and] separation-of-powers principles." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). "[S]uch a right to relief" extends to constitutional claims "as a general matter" and is not limited to "particular constitutional provisions." *Id.* The Villegases thus have an implied private right of action directly under the Constitution for each of their claims.

9. Additionally, the Administrative Procedure Act provides a cause of action for the Villegases to challenge the compliance order, because compliance orders are final agency actions. 5 U.S.C. § 704; *Sackett v. EPA*, 566 U.S. 120 (2012).

10. Venue in the District of Kansas is proper because a defendant in this action resides within the district and a substantial part of the events or omissions giving rise to the claim occurred within the district. 28 U.S.C. § 1391(e).

11. Pursuant to Local Rule 40.2, trial is requested to be held in Kansas City, Kansas, due to its proximity to Kansas City International Airport, a convenient airport into which the Villegases and lead counsel would be able to fly for court appearances.

PARTIES

12. Plaintiffs Tom and Amy Villegas are a married couple who reside in Colorado.

13. Defendant Michael S. Regan is the Administrator of the EPA and the official charged by law with administering the relevant portions of the Clean Water Act. *E.g.*, 33 U.S.C. § 1319. He is sued in his official capacity only.

14. Defendant Meg McCollister is the Administrator of Region 7 of the EPA. She is sued in her official capacity only. The EPA Administrator has delegated to the Region 7

Administrator the relevant authority to enforce the Clean Water Act. EPA Region 7 is headquartered in Lenexa, Kansas.

15. Defendant David Cozad is the Director of the Enforcement and Compliance Assurance Division of EPA Region 7. He is sued in his official capacity only. The Region 7 Administrator has delegated to the Director the relevant authority to enforce the Clean Water Act. Mr. Cozad filed an administrative complaint against the Villegases, initiating the administrative adjudication that is the subject of this suit. He also issued the compliance order against the Villegases. Mr. Cozad works from the EPA Region 7 headquarters in Lenexa, Kansas.

FACTUAL ALLEGATIONS

16. Around December 2015, the Villegases purchased an undeveloped lot in Nebraska, intending to use it for outdoor recreation.

17. Between January 2016 and December 2020, the Villegases set about improving the property by removing dead trees, which posed a fire hazard, and invasive Phragmite weeds. Phragmite weeds are classified by the Nebraska Department of Agriculture as a noxious weed, and these weeds destroy wetlands by impeding water flow, trapping sediment, and eventually filling in and drying out the wetland. They also outcompete native vegetation, reducing biodiversity and depriving wildlife of habitat.

18. The Villegases' efforts were successful, and the property today is safer from fire, more welcoming to native wildlife, and more accessible for recreation.

Susan Biro and the EPA Administrative Adjudication Against the Villegases

19. On August 2, 2022, Mr. Cozad filed an administrative complaint against the Villegases, alleging violations of the Clean Water Act and seeking monetary penalties pursuant to 33 U.S.C. § 1319(g)(2)(B).

20. The Clean Water Act prohibits most unpermitted discharges of pollutants into regulated waters. *See* 33 U.S.C. § 1311(a).

21. The complaint, which seeks to penalize the Villegases with $299,857 in fines, alleged that the Villegases had placed materials such as "dirt, spoil, rock, culverts, trees, and sand into waters of the United States." The complaint initiated an administrative adjudication with EPA Docket Number CWA-07-2022-0104, styled *In the Matter of Tom Villegas and Amy Villegas*.

22. On September 8, 2022, the adjudication was assigned to EPA's putative Chief Administrative Law Judge Susan Biro. That same day, Ms. Biro ordered the parties to conduct prehearing exchanges and set a schedule for doing so. Prehearing exchanges are a preliminary step in the adjudicatory process in which the parties identify the witnesses and exhibits they intend to present at the hearing.

23. As of this filing, the parties continue to conduct prehearing preparations.

24. Ms. Biro was not appointed as Administrative Law Judge through nomination by the President and confirmation by the Senate.

David Cozad and the Compliance Order Issued Against the Villegases

25. On August 2, 2022, Mr. Cozad signed a document entitled Findings of Violation and Order for Compliance.

26. Mr. Cozad, through the compliance order, concluded that the Villegases had, without a permit, discharged pollutants into waters of the United States and therefore concluded that the Villegases had violated the Clean Water Act.

27. Mr. Cozad, through the compliance order, ordered the Villegases to plan for and conduct extensive improvements to the Nebraska property. Mr. Cozad ordered the Villegases to allow officials from EPA and Army Corps of Engineers to enter their property.

28. Mr. Cozad was not appointed as Region 7 Director of Enforcement and Compliance Assurance through nomination by the President and confirmation by the Senate.

29. Mr. Cozad was not appointed as Region 7 Director of Enforcement and Compliance Assurance by the President alone, by a head of department (such as the EPA Administrator), or by a court of law.

30. Mr. Cozad was putatively hired as Region 7 Director of Enforcement and Compliance Assurance as a civil service official. On information and belief, Mr. Cozad's hiring was not personally approved by the EPA Administrator.

LEGAL BACKGROUND

Administrative Adjudications at the EPA

31. The Clean Water Act grants the Administrator a range of enforcement tools for alleged violations of the statute. He may issue a compliance order, 33 U.S.C. § 1319(a), bring a civil action in federal court for monetary and injunctive relief, *id.* § 1319(b), (d), seek criminal penalties, *id.* § 1319(c), or assess a civil penalty in an administrative adjudication, *id.* § 1319(g).

32. Civil penalties under § 1319(g) are divided into two classes: Class I and Class II. *Id.*

33. Defendants have initiated an administrative adjudication against the Villegases, seeking Class II penalties.

34. Both classes of penalties have penalty caps, but the cap is higher for Class II penalties. At the time the administrative adjudication began, the cap for Class II penalties was $299,857. Class II penalties are assessed through an administrative adjudication conducted pursuant to the adjudicatory provisions of the Administrative Procedure Act (APA). *Id.* § 1319(g)(2)(B); *cf.* 5 U.S.C. § 554.

35. Adjudications under the APA, including Class II adjudications, are presided over by an administrative law judge, an executive official. *See* 5 U.S.C. § 556(b)(3). EPA regulations provide the specific procedures to be used in the administrative adjudications for Class II penalties. 40 C.F.R. § 22.1(a)(6).

36. The ALJ may administer oaths, issue subpoenas and "all necessary orders," "[e]xamine witnesses," rule on the admissibility of evidence, and punish discovery violations with adverse inferences. 40 C.F.R. § 22.4(c) (defining powers of the Presiding Officer); 40 C.F.R. § 22.3(a) (defining Presiding Officer to be an ALJ); *see also* 5 U.S.C. § 556(c).

37. The ALJ then decides questions of both law and fact and, ultimately, decides the defendant's liability in an "initial decision." 40 C.F.R. § 22.27. The initial decision becomes final after 45 days if no party appeals to the Environmental Appeals Board (EAB or Board) and the Board does not initiate *sua sponte* review. *Id.* § 22.27(c). A finalized ALJ decision "constitutes the final Agency action." *Id.* § 22.31(a).

38. If the EAB conducts a review of the ALJ decision, it may "adopt, modify, or set aside the findings of fact and conclusions of law or discretion." *Id.* § 22.30(f). It cannot accept new evidence; if new evidence is required, the EAB must remand the case to the ALJ. *Id.* The EAB issues its decision in a final order, which "constitutes the final Agency action." *Id.* § 22.31(a).

39. The parties may not appeal to the EPA Administrator from an ALJ or EAB decision (except where the decision is directed against another federal agency). *Id.* § 22.31(e)(1). Nor may the Administrator initiate review of an ALJ or EAB decision or consider any motions directed to him. *Id.* § 22.4(a)(1). Instead, the Administrator may decide a case or motion only when and if the EAB allows him to do so "in its discretion." *Id.* In that case, the decision of the Administrator constitutes the final agency action. *See id.*; *id.* § 22.31(a).

40. The ALJ's factual findings, if affirmed by the EAB, are reviewable in an Article III court only for substantial evidence. *See* 33 U.S.C. § 1319(g)(8).

EPA Administrative Law Judges and the Environmental Appeals Board

41. EPA's ALJs are appointed by the EPA Administrator. ALJs may not be removed, suspended, or have their pay or pay-grade reduced, except for cause and with the agreement of the Merit Systems Protection Board (MSPB). 5 U.S.C. § 7521 (excepting reductions in force, employment actions taken for national security reasons, and disciplinary actions proposed by a Special Counsel and approved by the MSPB).

42. The EAB is composed of four members of the career Senior Executive Service.

43. As members of the career Senior Executive Service, EAB members are selected through the civil service's merit staffing process, which identifies the most qualified applicants based on non-political criteria. EAB members are not nominated by the President or confirmed by the Senate.

44. The EPA Administrator designates EAB members from among those identified as most qualified.

45. The Board typically sits in three-member panels and decides cases by majority vote.

46. Members of the career Senior Executive Service cannot be fired without cause or, during changes in leadership, *see* 5 C.F.R. § 317.901, be reassigned out of their positions without their consent.

Compliance Orders and the EPA Region 7 Director of Enforcement and Compliance Assurance

47. Orders described in 33 U.S.C. § 1319(a)(3) are known as compliance orders.

48. Compliance orders may require recipients to cease violative actions and to take action to restore affected areas.

49. The failure to obey a compliance order is punishable in district court by an accumulating civil penalty. 33 U.S.C. § 1319(d). The civil penalty as enacted was $25,000 per day of noncompliance, but the current inflation-adjusted amount under the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, is $64,618 per day of noncompliance. 88 Fed. Reg. 986, 989 (Jan. 6, 2023).

50. The Clean Water Act vests the power to issue compliance orders in the EPA Administrator.

51. The Director of EPA Region 7's Division of Enforcement and Compliance Assurance ("Director") is vested with the power to issue compliance orders.

52. The Director obtained that power through delegation from a superior official within EPA.

53. The Director may issue compliance orders without the concurrence of a Senate-confirmed official.

The Appointments Clause

54. The Appointments Clause of the United States Constitution requires all "Officers of the United States" to be appointed pursuant to its requirements. U.S. Const. art. II, § 2, cl. 2.

55. Any position vested with "significant authority" under federal law must be filled pursuant to the Appointments Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). A position is vested with significant authority whenever its occupant possesses "significant discretion" in carrying out "important functions." *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991).

56. When an appointment provision is defective for failing to comply with the Appointments Clause, it "is never really part of the body of governing law (because the Constitution automatically displaces any conflicting . . . provision from the moment of the

provision's enactment)." *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021). Thus, an individual purportedly appointed to an office pursuant to a defective appointment provision "never really" occupies the office and so "lack[s] the authority to carry out the functions of the office." *Id.* at 1788. Instead, they possess only "color of official title," *Ryder v. United States*, 515 U.S. 177, 180 (1995), and their actions are "void" as actions of the offices to which they are purportedly appointed, *Collins*, 141 S. Ct. at 1787.

57. The Appointments Clause categorizes officers as either (1) noninferior officers (also called principal officers) or (2) inferior officers. The default rule for both principal and inferior officers is that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" such officers. U.S. Const. art. II, § 2, cl. 2. There is an Excepting Clause for inferior officers: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.* The Excepting Clause does not apply to principal officers, who must always be appointed by the President and confirmed by the Senate.

58. An officer qualifies as "inferior" only if his work "is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). It is necessary but "not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude." *Id.* at 662–63. The key question, rather, is "how much power [the] officer exercises free from control" of a Senate-confirmed appointee. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021).

59. The Supreme Court has identified three factors that bear on this question. The factors are: (1) whether the officer is subject to oversight by a Senate-confirmed official in the

conduct of his duties; (2) whether the officer is subject to removal without cause by a Senate-confirmed official; and (3) whether the officer has the power to issue a final decision for the Executive Branch. *Edmond*, 520 U.S. at 664–65.

60. But regardless of factors (1) and (2), if an officer has "the power to render a final decision on behalf of the United States without any . . . review by [a] principal officer in the Executive Branch," then that officer must be appointed as a principal officer. *Arthrex*, 141 S. Ct. at 1981 (cleaned up).

61. Even if an official is an inferior officer, he or she must still be appointed by Presidential nomination and Senate confirmation unless Congress by law has vested that appointment in the President, a head of department, or a court of law.

62. The practical result of the Appointments Clause is that officers with more discretion must be appointed by Presidential nomination and Senate confirmation, while closely supervised officers with less discretion may be appointed with less scrutiny (but only if allowed by a law enacted by Congress). Only non-officers—those who lack any significant federal authority—may be selected by other means.

Article III

63. Article III of the U.S. Constitution vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. It requires that the judges of those federal courts "shall hold their Offices during good Behaviour" and "receive for their Services[] a Compensation[] [that] shall not be diminished" during their tenure. *Id.* It further specifies that the judicial power extends to all cases "arising under this Constitution [or] the Laws of the United States." *Id.* § 2, cl. 1.

64. Article III's limitation of the judicial power of the United States to Article III courts has two aspects.

65. One aspect is a "personal right" stemming from a party's interest in "an impartial and independent federal adjudication." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986) (noting that this is one of "Article III's guarantee[s]"). Because this aspect is based on personal interests, it may be waived, *e.g.*, by consenting to an administrative adjudication.

66. The other aspect of Article III is a bar against the exercise of core judicial power by a coordinate branch of government. This structural aspect of Article III protects the "institutional integrity of the Judicial Branch" and has received the most attention in courts. *Id.* at 851. Because this aspect is based on separation-of-powers concerns presenting "institutional interests that the parties cannot be expected to protect," it is nonwaivable. *Id.*

67. To determine whether an adjudicatory scheme usurps core judicial power and thus violates the nonwaivable aspect of Article III, the Court has looked to

> the extent to which the essential attributes of judicial power are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.

Id. (simplified).

68. In considering "the origins and importance of the right to be adjudicated," *id.*, a key question is whether the right is a public right or a private right. A public right "could be conclusively determined by the Executive and Legislative Branches," whereas "private rights . . . are normally within the purview of the judiciary" such that their adjudication outside of Article III poses a greater "danger of encroaching on the judicial powers." *Id.* at 853–54.

69. The two aspects of Article III must be separately satisfied. Thus, even if the personal aspect is waived, a claimant may successfully argue that an adjudication violates Article III's structural aspect. Conversely, even if an administrative adjudication does not threaten a core judicial power such that the structural aspect is satisfied, Article III may still require an Article III forum to protect an individual's right to an independent and impartial adjudicator.

DECLARATORY AND INJUNCTIVE RELIEF ALLEGATIONS

70. The EPA's administrative adjudicatory scheme hales the Villegases before an individual who was never appointed as an ALJ consistent with the Constitution, subjects them to her jurisdiction, and compels them to plead their case to her and obey her orders. This coercion injures the Villegases because, without appointment as an ALJ, Ms. Biro lacks the authority of that office and the Villegases should not be required to participate in the administrative adjudication or be subject to Ms. Biro's orders.

71. A decision declaring that Ms. Biro is improperly appointed under the Appointments Clause and thus without power to preside over the adjudication would remedy the Villegases' injury by freeing them from Ms. Biro's authority.

72. Similarly, Ms. Biro lacks the power to preside over the adjudication because an adjudication seeking monetary penalties may take place only before an Article III judge, and Ms. Biro does not occupy an Article III judgeship, whether or not she has been appointed as an ALJ consistent with the Constitution. Nevertheless, the Villegases are subjected to Ms. Biro's authority and compelled to plead their case to her and obey her orders. A decision declaring Ms. Biro to be improperly presiding over the adjudication under Article III would remedy the Villegases' injury by freeing them from Ms. Biro's authority.

73. Lastly, Mr. Cozad's compliance order requires the Villegases to make costly improvements to their property and threatens them with daily accumulating fines of more than $64,000 per day. A decision declaring the compliance order to be void would remedy the Villegases' injury by establishing that they have no obligation to comply with the order and that they may not be fined for noncompliance.

74. The Villegases have no plain, speedy, and adequate remedy at law for their injuries. Money damages in this case are not available.

75. This case is currently justiciable because the administrative adjudication has already been initiated and the Villegases are currently subject to Ms. Biro's authority. Additionally, the compliance order is already final and subjects the Villegases to its terms.

76. Declaratory and injunctive relief are appropriate to resolve this controversy.

FIRST CLAIM FOR RELIEF

Adjudication in Violation of the Appointments Clause because by an Individual Not Holding the Office of Administrative Law Judge

77. The preceding paragraphs are incorporated herein by reference.

78. EPA administrative law judges are officers of the United States. They possess significant and continuing federal authority. For example, ALJs possess the authority to take testimony, conduct trials, rule on the admissibility of evidence, punish a party's failure to comply with a discovery order, and decide cases.

79. Individuals may therefore be appointed as EPA ALJs only pursuant to the Appointments Clause. *See Lucia v. SEC*, 138 S. Ct. 2044, 2053 (2018).

80. EPA ALJs are principal officers. They are not directed and supervised by "others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663. They are not removable at will. 5 U.S.C. § 7521. And their decisions

are reviewable only by members of the EAB, who are not appointed by Presidential nomination and Senate confirmation. Moreover, ALJ decisions represent the Executive Branch's final decisions in matters where no appeal to the EAB is taken, meaning ALJ decisions can become final without any review by a Senate-confirmed principal officer.

81. As principal officers, EPA ALJs may be appointed only by Presidential nomination and Senate confirmation.

82. Ms. Biro was neither nominated by the President nor confirmed by the Senate.

83. Accordingly, Ms. Biro has not been appointed as a principal officer and thus has never been appointed as an EPA ALJ.

84. Ms. Biro therefore lacks the authority of an EPA ALJ, including the authority to conduct the administrative adjudication to which the Villegases are currently subject.

85. Alternatively, even if EPA ALJs are inferior officers, Ms. Biro has not been appointed as an inferior officer and thus was never appointed as an EPA ALJ.

86. Ms. Biro has not been appointed by the default method for inferior officers, *viz.*, Presidential nomination and Senate confirmation.

87. Additionally, Congress has not vested the appointment of ALJs in the President, a head of department, or a court of law.

88. Although 5 U.S.C. § 3105 allows "[e]ach agency" to appoint ALJs, that statute is merely a civil-service provision that authorizes agencies to employ ALJs. Reading the provision as vesting inferior-officer appointment authority under the Excepting Clause would render the statute unconstitutional, because only the President, heads of departments, and courts of law—not every agency—may appoint inferior officers under the Excepting Clause.

89. Understanding § 3105 as a civil-service provision is consistent with Congressional intent because the provision was adopted before the Supreme Court established in *Lucia v. SEC* that ALJs are officers of the United States. It is therefore unlikely that Congress would have considered ALJs to be officers at the time it enacted § 3105—hence the statute's allowance for the appointment of ALJs by "agenc[ies]" rather than the President, a head of department, or a court of law.

90. Similarly, Reorganization Plan No. 3 § 3 of 1970 did not vest EPA with the ability to appoint inferior officers. It did not vest EPA with all the powers available under 5 U.S.C. § 301.

91. In any event, the housekeeping powers under 5 U.S.C. § 301 do not include the "house-making" power of creating offices for purposes of the Excepting Clause. *See United States v. Concord Mgmt. & Consulting LLC*, 317 F. Supp. 3d 598, 622 (D.D.C. 2018) ("Th[e] power to 'keep house,' however, is not the same as the power to 'build the house' by appointing officers.").

92. Furthermore, even if Section 301 purports to delegate such power, the Appointments Clause forbids this delegation, because office creation cannot be delegated but must be effected "by Law." U.S. Const. art. II, § 2, cl. 2.

SECOND CLAIM FOR RELIEF

Violation of Article III

93. The preceding paragraphs are incorporated herein by reference.

94. Article III forbids the adjudication of the Clean Water Act claim against the Villegases outside of the protections of Article III.

95. First, the structural aspect of Article III requires that the claim be heard in an Article III forum, because the adjudication of the Clean Water Act claim is an exercise of core judicial power.

a. Through its administrative adjudication, EPA seeks an administrative order and judgment determining that the Villegases violated the Clean Water Act and requiring them to pay civil penalties. The Villegases have a private right to their money, as well as to reasonable use of their real property, neither of which the Executive or Legislative Branch may "conclusively" deprive them of without the necessary involvement of an Article III court. *See Schor*, 478 U.S. at 854. Yet that is precisely what an EPA administrative penalty does. *See* 33 U.S.C. § 1319(g)(5), (9) (order automatically becomes a final and judicially enforceable money judgment thirty days after issuance unless judicial review is sought). The EPA therefore seeks to deprive the Villegases of private rights through its administrative adjudication which, because of its finality, judicial enforceability, and limited review by Article III courts, *see id.* § 1319(g)(8), purports to exercise one of the essential attributes of judicial power reserved to Article III courts.

b. The "concerns that drove Congress to depart from the requirements of Article III" do not justify that departure. *Schor*, 478 U.S. at 851. When the administrative penalty power was added to the Clean Water Act in 1987, its evident purpose was to provide a streamlined means for EPA to levy penalties, without having to bring a civil action in district court. *See* S. Rep. No. 99-50, at 26–27 (1985) ("Administrative penalties could provide greater deterrent value than an administrative order for a violation that does not warrant the more resource intensive aspects of judicial enforcement. [¶] Administrative enforcement should be as flexible and unencumbered by

procedural complexities as possible . . . ."). Yet the Supreme Court has never held that administrative efficiency standing alone can justify a departure from Article III. Approving such a departure would be particularly unwarranted here, given that the administrative scheme is merely an appendage to the Clean Water Act's robust, and otherwise Article III–compliant, enforcement menu. *See* 33 U.S.C. §§ 1319(b)–(d), 1365(a); *see also* S. Rep. No. 99-50, at 26 ("This authority to issue administrative penalty orders is intended to complement and not to replace a vigorous civil judicial enforcement program.").

c. The adjudication of the Clean Water Act claim at issue in the EPA administrative proceeding is therefore a core judicial power and, under the structural aspect of Article III, may be assigned only to an Article III court.

d. Ms. Biro is purportedly an ALJ employed by EPA but is not an Article III judge. EPA's in-house proceeding against the Villegases is not an Article III proceeding and is not presided over or overseen by an Article III judge.

e. The EPA's in-house proceeding therefore violates Article III.

f. A judgment so deciding would remedy the Villegases' injury of being subjected to Ms. Biro's authority and being compelled to plead their case before her and obey her orders.

96. Second, the personal aspect of Article III requires that the claim be heard in an Article III forum, because the claim seeks to penalize the Villegases by depriving them of $299,857 and reasonable use of their property by seeking to fine such use. Such a deprivation requires "Article III's guarantee of an impartial and independent federal adjudication," particularly when

the alternative places an employee of the prosecuting agency in the position of both adjudicating the claim and determining the facts. *See Schor*, 478 U.S. at 848.

a. The Villegases have not consented and do not consent to the EPA's adjudication and so have not waived the personal aspect of Article III.

b. Ms. Biro is purportedly an ALJ employed by EPA but is not an Article III judge. EPA's in-house proceeding against the Villegases is not an Article III proceeding and is not presided over or overseen by an Article III judge.

c. The EPA's in-house proceeding therefore violates Article III.

d. A judgment so deciding would remedy the Villegases' injury of being subjected to Ms. Biro's authority and being compelled to plead their case before her and obey her orders.

THIRD CLAIM FOR RELIEF

Issuance of Compliance Order by an Individual Not Holding the Office of Director of EPA Region 7's Enforcement and Compliance Assurance Division

97. The preceding paragraphs are incorporated herein by reference.

98. The Director of EPA Region 7's Enforcement and Compliance Assurance Division is an officer of the United States. The office is vested with significant and continuing federal authority. For example, pursuant to delegated authority, the Director may issue binding compliance orders described in 33 U.S.C. § 1319(a)(3). On information and belief, the Director possesses other significant delegated powers.

99. The office of Director of EPA Region 7's Enforcement and Compliance Assurance Division may be filled only pursuant to the Appointments Clause.

100. The Director is a principal officer. The Director is not directed and supervised by "others who were appointed by Presidential nomination with the advice and consent of the Senate."

Edmond, 520 U.S. at 663. The Director is not removable at will. And when the Director issues a compliance order, it is immediately final, effective, and binding.

101. As a principal officer, a Director may be appointed only by Presidential nomination and Senate confirmation.

102. Mr. Cozad was neither nominated by the President to the office of the Director nor confirmed by the Senate.

103. Accordingly, Mr. Cozad has not been appointed as Director.

104. Mr. Cozad therefore lacks the authority of the Director, including the authority to issue compliance orders.

105. Alternatively, even if the Director were an inferior officer, Mr. Cozad has not been appointed as an inferior officer and thus was never appointed as Director.

106. Mr. Cozad has not been appointed by the default method for inferior officers, Presidential nomination and Senate confirmation.

107. Additionally, Congress has not vested the appointment of the Director of the Enforcement and Compliance Assurance Division of EPA Region 7 in the President, a head of department, or a court of law.

108. Reorganization Plan No. 3 § 3 of 1970 did not vest EPA with the ability to appoint inferior officers. It did not vest EPA with all housekeeping powers available under 5 U.S.C. § 301.

109. In any event, the housekeeping powers under 5 U.S.C. § 301 do not include creating offices for purposes of the Excepting Clause.

110. Furthermore, office creation cannot be delegated but must be effected "by Law." U.S. Const. art. II, § 2, cl. 2.

111. To the extent Defendants rely on the authorization of individuals other than Mr. Cozad to defend the validity of the compliance order against the Villegases, such authorization has no effect, because those individuals—just like Mr. Cozad—were not appointed pursuant to the Appointments Clause, which is required for them to wield significant power, such as authorizing the issuance of a compliance order.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for relief as follows:

1. A judgment declaring that the EPA proceeding with the docket number CWA-07-2022-0104, styled *In the Matter of Tom Villegas and Amy Villegas*, violates the Appointments Clause;

2. A preliminary and permanent prohibitory injunction enjoining Defendants from continuing such proceeding or enforcing orders issued in the proceeding, because the proceeding violates the Appointments Clause;

3. A judgment declaring that the EPA proceeding with the docket number CWA-07-2022-0104, styled *In the Matter of Tom Villegas and Amy Villegas*, violates Article III;

4. A permanent prohibitory injunction enjoining Defendants from continuing such proceeding or enforcing orders issued in the proceeding, because the proceeding violates Article III;

5. A judgment declaring that the Findings of Violation and Order for Compliance issued against Plaintiffs by Mr. Cozad are void because Mr. Cozad was not appointed as Director of Enforcement and Compliance Assurance for EPA Region 7;

6. A permanent prohibitory injunction enjoining Defendants from enforcing or seeking the enforcement of the Findings of Violation and Order for Compliance;

7. An award of reasonable attorney fees and costs, pursuant to 28 U.S.C. § 2412, or any other applicable authority; and

8. Any other relief that the Court deems just and proper.

Dated: April 20, 2023.

Respectfully submitted:

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