UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

TENNESSEE RIVERKEEPER, INC., Plaintiff, v. CITY OF LUTTRELL, Defendant.	)	No. 3:25-cv-00541-KAC-JEM

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

The pursuit of this case by Plaintiff Tennessee Riverkeeper, Inc. ("Plaintiff") upsets the balance struck by the U.S. Constitution's Framers. In 1787, they vested the executive power in a President and established Executive Branch unity by giving the President the power to appoint, oversee, and remove subordinates. The Framers feared that a plural executive would lead to second-guessing of the President's decisions, creating tyrannical execution of the laws, which would threaten liberty. Although they chose this arrangement to ensure the steady administration of the laws, Congress shattered Executive Branch unity by creating Clean Water Act ("CWA") citizen suits, which allow additional actors to exercise executive power. And that is exactly what happened here: despite being notified of the alleged violations in July 2025, the President's subordinates declined to bring an enforcement action. That should have been the end of the story. But because Congress undermined the President's prerogatives, Plaintiff—who thinks it knows better than the President, Department of Justice ("DOJ"), and U.S. Environmental Protection Agency ("EPA")—was allowed to bring the very claim the Executive Branch declined to pursue. This is not an isolated incident for Plaintiff, as this is the twenty-fifth CWA citizen suit it has filed in the past eight years, second guessing the government's enforcement discretion.

But the ability of private plaintiffs to second-guess the President's enforcement decisions is not the worst aspect of citizen suits. By allowing private individuals who are not part of the federal government to exercise executive power, such suits also threaten the liberty and accountability our Framers sought to ensure. The vesting of all executive power in an accountable government official was just as much a part of Article II's design as the vesting of that power in one individual. Under this structure, private, unaccountable plaintiffs may not seek public remedies, which is exactly what Plaintiff attempts here by suing for civil penalties payable to the U.S. Treasury to the tune of $74,958.04 per day, per violation. The Supreme Court recently confirmed that the very relief Plaintiff seeks is quintessentially executive power. Because Plaintiff wields executive power and brings a lawsuit that the Executive Branch declined to pursue, it interferes with the President's ability to employ prosecutorial discretion and violates the Executive Vesting and Take Care Clauses. Its wielding of executive power also triggers the private nondelegation doctrine, which prevents private individuals from wielding government power and limits their role to giving advice, assistance, and recommendations to an agency with authority and surveillance over them. Plaintiff cannot meet this test, and thus, its citizen suit violates the Executive Vesting Clause and the private nondelegation doctrine. Finally, Plaintiff exercises significant governmental authority on a continuing basis contrary to the Appointments Clause. For these reasons, its pursuit of this suit is unconstitutional, and the Court should dismiss the Complaint with prejudice.

STATEMENT OF FACTS & PROCEDURAL HISTORY

The City of Luttrell ("Luttrell" or "Defendant") is a small community of approximately 1,000 residents located about twenty-five miles east of Knoxville. *See* Complaint ¶ 15. It owns and operates a dated sewage treatment plant, for which it obtained National Pollutant Discharge

Elimination System Permit No. TN0064149 (the "NPDES Permit"), which allows it to discharge treated wastewater to Flat Creek, subject to stated discharge limitations. *Id.* ¶¶ 15, 22. Flat Creek is a tributary of the Holston River. *See* Dkt. No. 1-1 at ECF p. 2. Pursuant to 33 U.S.C. § 1365(b)(1)(A), on July 8, 2025, Plaintiff sent a Notice of Intent to Sue Letter to Luttrell, the EPA Administrator, and the Commissioner of the Tennessee Department of Environment & Conservation ("TDEC"), threatening to sue and alleging Luttrell was violating its NPDES Permit "by operating the Sewage Treatment Plant in a manner which discharges pollutants to the waters of the United States and waters of the state in excess of the permit limitations." *Id.*; *see* Compl. ¶ 6. This Notice Letter's Appendix A listed alleged discharge limit violations for (1) solids, total suspended; (2) solids, settleable; (3) BOD, carbonaceous; (4) solids, suspended percent; (5) E. coli; and (6) nitrogen, ammonia total. *See* Dkt. No. 1-1 at ECF pp. 5–7.[1]

Plaintiff alleges that some of its members "have recreated in, on or near, or otherwise used and enjoyed, or attempted to use and enjoy, the Flat Creek and the Holston River in the past, and they intend to do so in the future." Compl. ¶ 11. Plaintiff's members allegedly "now recreate less on the Holston River because of" Luttrell's alleged discharges. *Id.* ¶ 12. Exhibit B to the Complaint is the Declaration of Petrus Snijders, who is a member of Plaintiff. *Id.* ¶ 13; Dkt. No. 1-2. Snijders declares that he has a guide service, where he takes his clients not on Flat Creek or the Holston River, but "on the Harpeth River, Buffalo River, Caney Fork, Percy Priest, Old Hickory Lake, [and] the Cumberland River." *See* Dkt. No. 1-2 ¶ 5. He allegedly "sometimes fish[es] in the Holston River and Richland Creek." *Id.* ¶ 6. Although he "fished a tournament in the Holston River in October 2025," he does not report noticing any pollution-related issues from this trip. *Id.* ¶ 7.

[1] At all times, and without admitting any violations, Luttrell has cooperated with TDEC, with the goal of breaking ground on a new wastewater treatment plant next year.

Neither EPA nor TDEC initiated a lawsuit against Luttrell prior to November 4, 2025. *See* Compl. ¶ 7. On that date, Plaintiff filed its single-count CWA Complaint under 33 U.S.C. § 1365(a), alleging Luttrell's discharges to Flat Creek violated its NPDES Permit limitations. *Id.* ¶¶ 25-31. Plaintiff prays for declaratory and injunctive relief, "requests and petitions this Court to assess a $74,958.04 civil penalty . . . against Defendant Luttrell for each violation and each day of continuing violation," and seeks "an award of litigation costs, including reasonable attorney's fees and expert fees." *See* Compl. Prayer for Relief. On December 5, 2025, the parties' attorneys held the conference required by the Order Governing Motions to Dismiss, and they "have been unable to agree that the pleading is curable by a permissible amendment." *See* Dkt. No. 5.

LEGAL STANDARD

A motion to dismiss should be granted where the complaint lacks "factual allegation[s] sufficient to plausibly suggest" a claim's elements. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–83 (2009).

LEGAL ARGUMENT

I. Plaintiff Is Exercising the Executive Power

Through the CWA's citizen suit provision, Congress has unconstitutionally vested executive power in private citizens by allowing them to seek civil penalties payable to the U.S. Treasury for alleged permitting violations. The Framers vested "the 'executive Power'—all of it—. . . 'in a President,'" and the Supreme Court has held that the pursuit of "daunting monetary penalties against private parties on behalf of the United States in federal court [is] a quintessentially executive power." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203, 219 (2020) (citation omitted); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 197 (2000) (Kennedy, J., concurring) (questioning "whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article

II"). Because Plaintiff seeks civil penalties payable to the U.S. Treasury of nearly $75,000 "for each violation and each day of continuing violation"—Plaintiff is exercising executive power. *See* Compl. Prayer for Relief ¶ (c); *see also* Baron de Montesquieu, *The Spirit of the Laws* Pt. 2, Bk. 11, Ch. 6, p. 157 (Anne M. Cohler, Basia C. Miller & Harold S. Stone eds. 1989) (1748) ("the executive power" includes the power by which the magistrate "punishes"); John Locke, *Second Treatise on Government* §§ 7, 13, pp. 9, 12 (East India Publishing Co. ed. 2023) (1689) ("the executive power" includes the "right to punish the transgressors").[2]

Further, Plaintiff exercises executive power by "conducting civil litigation in the courts of the United States for vindicating public rights[.]" *Buckley v. Valeo*, 424 U.S. 1, 140 (1976). There is a "longstanding distinction between injured parties seeking reparation for private harms and suits by sovereigns that 'seek to redress a wrong to the public as a whole, not just a wrong to the individual.'" *United States ex rel. Zafirov v. Fla. Med. Assocs., LLC*, 751 F. Supp. 3d 1293, 1313 (M.D. Fla. 2024) (quoting *Trump v. United States*, 603 U.S. 593, 614 (2024)). This distinction is rooted in "the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: private wrongs and public wrongs,'" *Huntington v. Attrill*, 146 U.S. 657, 668–69 (1892) (quoting 3 William Blackstone, Commentaries on the Laws of England *2), and "[r]ights were typically divided into private rights and public rights." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 548 (2020) (Thomas, J., concurring).

[2] Because *Seila Law* already settled this issue, this Court can hold that Plaintiff's pursuit of civil penalties is an exercise of the executive power based on this precedent alone. Also, under an originalist analysis, it may consider the writings of political theorists who shaped the original public meaning of the phrase "the executive power." *United States v. Rahimi*, 602 U.S. 680, 708–10 (2024) (Gorsuch, J., concurring); *id.* at 715, 722 n.3, 723 (Kavanaugh, J., concurring); *id.* at 737–39 (Barrett, J., concurring). Along with Blackstone, Locke and Montesquieu most influenced the Framers regarding this concept. *Sierra v. City of Hallandale Beach*, 996 F.3d 1110, 1134 (11th Cir. 2021) (Newsom, J., concurring) ("[O]nly the sovereign can bring legal actions on behalf of the community for remedies that accrue to the public. It enjoys the *exclusive* executive power.").

"'Public rights'" are those "that involve duties owed 'to the whole community, considered as a community, in its social aggregate capacity.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring) (quoting 4 Blackstone, Commentaries *5); *see also Huntington*, 146 U.S. at 668 (citation omitted); *de Fontbrune v. Wofsy*, 838 F.3d 992, 1001 (9th Cir. 2016) (citation omitted). Public rights "include interests generally shared, such as those in the free navigation of waterways, passage on public highways, and general compliance with regulatory law." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 693 (2004) (footnote and citation omitted). A public wrong could be pursued by "indictment" only "at the suit of the king" for public remedies such as "fine and imprisonment." 4 Blackstone, *supra*, at *6. In contrast, private rights are those "'belonging to individuals, considered as individuals,'" *Spokeo*, 578 U.S. at 344 (Thomas, J., concurring) (quoting 3 Blackstone, *supra*, at *2); *see also Huntington*, 146 U.S. at 668 (citation omitted); *de Fontbrune*, 838 F.3d at 1001 (citation omitted). Such rights an individual can redress only by pursuing private remedies, which would "either restor[e] to him his right, if possible" (*i.e.*, have property taken from him returned), "or by giving him an equivalent" of "private compensation" through "civil satisfaction in damages." 4 Blackstone, *supra*, at *6–7; *see also* Locke, *supra*, at § 10, p. 10 ("a particular right to seek reparation from him that has done it").

The Sixth Circuit has confirmed that citizen suit plaintiffs sue to vindicate public rights because they "seek relief not on their own behalf but on behalf of society as a whole[.]" *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (citation omitted). And the Complaint indicates Plaintiff is suing to redress alleged wrongs to public rights because it alleges harms to "the waters of the United States." *See* Compl. ¶ 27. Indeed, Plaintiff acknowledges that the only time the CWA applies is when "the waters of the United States" are implicated. *Id.* ¶ 2. There are

alleged harms to two "waters," neither of which Plaintiff alleges an ownership interest in, as the only alleged "recreational, aesthetic, and environmental interests" are those shared by the whole community. *Id.* ¶¶ 11–13. Thus, Plaintiff is seeking to "[v]indicat[e] 'the *public* interest'" which "is the function of Congress and the Chief Executive.'" *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992)); *see also* 4 Blackstone, *supra*, at *2 (The sovereign was "the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence."); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 789 (2003) (The Framers understood the President would be the "avenger of public wrongs.").[3] Vindicating the public interest is not the function of private individuals, but because Plaintiff is attempting to do so, it exercises executive power.

II. CWA Citizen Suits Violate the Executive Vesting and Take Care Clauses by Preventing the Executive Branch from Employing Prosecutorial Discretion

Congress's vesting of executive power in private plaintiffs impairs the President's ability to employ prosecutorial discretion, which undermines the liberty interest Article II sought to secure. Although the "entire 'executive Power' belongs to the President alone," *Seila Law*, 591 U.S. at 213, the "Framers recognized, of course, that 'no single person could fulfill that responsibility alone, and expected that the President would rely on subordinate officers for assistance.'" *United States v. Arthrex*, 594 U.S. 1, 11 (2021) (citation omitted). But to ensure that he ultimately retains the entire executive power, "Article II 'grants to the President' the 'general administrative control of those executing the laws, including the power of appointment and *removal* of all executive officers.'" *Seila Law*, 591 U.S. at 214 (citation omitted). Together with

[3] Before filing suit, Plaintiff investigated potential CWA violations to decide whether to pursue an enforcement action, *see* Dkt. No. 1-1, which also is a core executive power. *See Trump*, 603 U.S. at 620; *Seila Law*, 591 U.S. at 206.

the Executive Vesting Clause, this power to control those executing the laws finds its source in the Take Care Clause. *See* U.S. Const. art. II, § 3. The Supreme Court has recently held that Congress violated this clause by impermissibly limiting one of the mechanisms the President employs to take care that the laws be faithfully executed: his ability to remove subordinates. *Collins v. Yellen*, 594 U.S. 220, 250–51 (2021) (unconstitutional removal restriction for the Federal Housing Finance Agency Director); *Seila Law*, 591 U.S. at 207 (unconstitutional removal restriction for the Consumer Financial Protection Bureau ("CFPB") Director); *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (unconstitutional multilevel removal restriction for the members of the Public Company Accounting Oversight Board).

Similar to the statutes at issue in the Court's recent precedents, the CWA's citizen suit provision impinges on another core executive function: the President's ability to employ prosecutorial discretion. *United States v. Texas*, 599 U.S. 670, 684 (2023) (stating that "one discrete aspect of the executive power" is "the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law"); *id.* at 689 (Gorsuch, J., concurring in judgment) (stating the executive vesting and take care clauses "give the President a measure of discretion over the enforcement of *all* federal laws, not just those that can lead to arrest and prosecution"). "The Presidential power of prosecutorial discretion is rooted in Article II," and "the President possesses a significant degree of prosecutorial discretion not to take enforcement actions against violators of federal law." *In re Aiken Cnty.*, 725 F.3d 255, 262 (D.C. Cir. 2013) (op. of Kavanaugh, J.); *see also United States v. Traficant*, 368 F.3d 646, 650 (6th Cir. 2004) ("'the Executive Branch [has] exclusive authority and absolute discretion to decide whether to prosecute a case'" (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974))). The Framers imbedded this concept in Article II because they took to heart "Montesquieu's maxim" that "[i]f the executive

and legislative powers were united, the wielder of both powers would enact tyrannical laws and execute them tyrannically." Prakash, *supra*, at 798 (footnotes omitted). With "the executive Power" separated, however, "the executive could temper the effects of tyrannical laws with mild execution." *Id.* at 781 (footnote omitted); *see also* Locke, *supra*, at § 11, p. 10–11 ("the magistrate . . . can often, where the public good demands not the execution of the law, remit the punishment of criminal offences by his own authority").

The power of prosecutorial discretion extends to "an agency's decision not to prosecute or enforce, whether through civil or criminal process, [and] is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). This is because:

> an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

Id. at 832 (quoting U.S. Const. art. II, § 3); *see also Buckley*, 424 U.S. at 139 (noting that "with respect to litigation conducted in the courts of the United States . . . 'all such suits, so far as the interests of the United States are concerned, are subject to the discretion, and within the control of, the Attorney-General'" (citation omitted)). Indeed, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, *not within the purview of private plaintiffs (and their attorneys)*." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) (emphasis added).

The following example shows how, through the CWA's citizen suit provision, Congress violated the Executive Vesting and Take Care Clauses by unconstitutionally impairing the President's ability to employ prosecutorial discretion. If the President did not want to pursue an alleged CWA violation and ordered the EPA Administrator to not initiate proceedings, but the Administrator refused, the President could remove the Administrator and appoint a subordinate

willing to carry out his enforcement decision. *Collins*, 594 U.S. at 256 ("The President must be able to remove not just officers who disobey his commands but also . . . 'those who exercise their discretion in a way that is not intelligent or wise,' those who have 'different views of policy,' . . . and those in whom he has simply lost confidence." (citation omitted)). His "authority to remove those who assist him in carrying out his duties" ensures that "the President could . . . be held fully accountable for discharging his own responsibilities[.]" *Free Enter. Fund*, 561 U.S. at 513–14.

But if a private plaintiff wants to bring a CWA citizen suit, and the President disagrees with this decision, the President cannot exercise his Article II power of prosecutorial discretion because private persons may not be removed by the President. If the Executive Branch does not prosecute the alleged CWA violation, the private plaintiff may bring suit sixty days after giving the EPA Administrator notice of the alleged violation. *See* 33 U.S.C. § 1365(b)(l)(A). To be sure, the President may head off the citizen suit by having the Administrator commence a lawsuit, *see id.* § 1365(b)(1)(B), but this impinges on the President's power of prosecutorial discretion by forcing him to do the very thing he does not want done. *Laidlaw*, 528 U.S. at 210 (Scalia, J., dissenting) (Section 1365 "allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken—which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all[.]"). In this way, the constitutionality of § 1365 is even more suspect than the False Claims Act ("FCA") *qui tam* statute because with the FCA, the government can intervene and dismiss an FCA *qui tam* action at any time over the relator's objection. *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 424 (2023); *see also id.* at 442 (Kavanaugh, J., joined by Barrett, J., concurring) (stating "'there are substantial

arguments that the *qui tam* device is inconsistent with Article II'" (citation omitted)); *id.* at 449 (Thomas, J., dissenting) (same).

Moreover, by requiring this Court "to enforce" the very "effluent standard or limitation" that the President has declined to enforce, *see* 33 U.S.C. § 1365(a), Congress exacerbates the Take Care violation by "transfer[ring] from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed.'" *Lujan*, 504 U.S. at 577 (citation omitted). The Supreme Court has "always rejected" such a "vision of [its] role" that "would enable the courts . . . to become 'virtually continuing monitors of the wisdom and soundness of Executive action.'" *Id.* (citations omitted); *see Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025) ("But federal courts do not exercise general oversight of the Executive Branch . . . ."). It has also recognized a distinction between "a mere ministerial duty, the performance of which might be judicially enforced," and a duty that is "purely executive and political." *Mississippi v. Johnson*, 71 U.S. 475, 498–99 (1866) (explaining that a ministerial duty "is one in respect to which nothing is left to discretion"). There are "general principles which forbid judicial interference with the exercise of Executive discretion," as any attempt by the Judiciary to control discretionary duties "might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and excessive extravagance.'" *Id.* at 499. This is exactly what Congress forces the Judiciary to do through citizen suit provisions like § 1365.

The Supreme Court's most recent Article II precedent confirms that Congress may not create citizen suit provisions to second-guess the Executive Branch's enforcement decisions. In *Trump v. United States*, the Court reiterated that "'the Executive Branch possesses authority to decide how to prioritize and how aggressively to pursue legal actions against defendants who violate the law,'" and this authority finds its source in the Take Care Clause. 603 U.S. at 620

(citations omitted). It also held that, "once it is determined that the President acted within the scope of his exclusive authority, his discretion in exercising such authority cannot be subject to further judicial examination." *Id.* at 608. All nine Justices agreed that "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id.* at 609; *see id.* at 678 (Sotomayor, J., dissenting). The CWA's citizen suit provision, however, allows Congress to avoid this prohibition by empowering private citizens to bring the very claims that the President decided to not pursue. Thus, "'by concentrating power in a unilateral actor insulated from Presidential control,'" Congress breaks the executive chain of command by allowing unaccountable private parties to bring lawsuits that the Executive Branch has chosen not to pursue. *Collins*, 594 U.S. at 251 (citation omitted).

This subjects citizen suit defendants to a loss of "liberty as described by Locke," which was "to be free from 'the inconstant, uncertain, unknown, arbitrary will of another man.'" *Dep't of Transp. v. Ass'n of Am. R.R.s*, 575 U.S. 43, 75–76 (2015) (Thomas, J., concurring in judgment) (quoting John Locke, *Second Treatise of Civil Government* § 22, p. 13 (J. Gough ed. 1947)); *see also Seila Law*, 591 U.S. at 223–24 ("secur[ing] the authority of the Executive" in a single individual was "essential to . . . 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty'"). Prosecutorial discretion "protect[s] individual liberty by essentially under-enforcing federal statutes regulating private behavior." *Aiken Cnty.*, 725 F.3d at 264; *see also Donziger v. United States*, 143 S. Ct. 868, 869 (2023) (Gorsuch, J., dissenting from denial of certiorari) (stating the decision to not sue "is one that belongs squarely within 'the special province of the Executive Branch'" and "[t]his 'structural principl[e]' serves to 'protect the individual' just as much as the Executive Branch" (alteration in original) (citation omitted)). But because CWA citizen suits prevent the proper operation of Article II, any private plaintiff who disagrees with

EPA's decision not to sue can bring suit and deprive a defendant of the liberty Article II sought to secure. As originally understood, the Executive Vesting Clause gave the President "the power to execute the laws," Prakash, *supra*, at 701, and the Supreme Court has repeatedly affirmed that this includes the President and his Executive Branch subordinates' power to decline to bring CWA proceedings. *Texas*, 599 U.S. at 678; *Heckler*, 470 U.S. at 831–32; *Aiken Cnty.*, 725 F.3d at 262. Congress undermined that prerogative with CWA citizen suits.

III. Plaintiff's Exercise of Executive Power Violates the Private Nondelegation Doctrine

Besides violating the Executive Vesting and Take Care Clauses, Plaintiff's attempt to wield unsupervised executive power runs afoul of the private nondelegation doctrine, which is violated when a law "allows non-governmental entities to govern." *FCC v. Consumers' Rsch.*, 606 U.S. 656, 697 (2025); *see also Nat'l Horsemen's Benevolent & Prot. Ass'n v. Black*, 53 F.4th 869, 880 (5th Cir. 2022) (The "Constitution permits only the federal government to exercise federal power."); *Ass'n of Am. R.R.s*, 575 U.S. at 62 (Alito, J., concurring) ("There is not even a fig leaf of constitutional justification" for allowing "private entities" to exercise "'executive Power,'" as "it raises 'difficult and fundamental questions' about 'the delegation of Executive power' when Congress authorizes citizen suits." (citation omitted)); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 352 (2002).[4]

[4] "This commonsense principle" "is reflected in the Supreme Court's nondelegation cases," in which the Court "has set its face against giving public power to private bodies." *Black*, 53 F.4th at 880. For example, in what the Supreme Court recently described as "the leading case" on the private nondelegation doctrine, the delegation in the Bituminous Coal Conservation Act of 1935 authorizing local coal district boards to adopt codes setting minimum coal prices was held unconstitutional. *Consumers' Rsch.*, 606 U.S. at 692. This was because it was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons." *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936); *see also Printz v. United States*, 521 U.S. 898, 922–24 (1997); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935).

In *Consumers' Research*, the Supreme Court clarified the test for the private nondelegation doctrine. "Government agencies may rely on advice and assistance from private actors" and "may enlist private parties to give [them] recommendations." *Consumers' Rsch.*, 606 U.S. at 692. Private parties must "'function[] subordinately to' the agency." *Id.* (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940)). And private parties must be "subject to [the agency's] 'authority and surveillance,'" such that the "agency retains decision-making power." *Id.* (quoting *Sunshine Anthracite*, 310 U.S. at 399). CWA citizen suits do not satisfy any of these conditions.

Once a citizen suit is filed, no government official has final decision-making authority, as the private plaintiff can make any litigation decisions it pleases. The only post-suit rights any officials have is that "the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator[,]" and "the Administrator, if not a party, may intervene as a matter of right." 33 U.S.C. § 1365(c)(2)–(3). But this ability to intervene does not give the government authority to manage the private plaintiff's litigation decisions or dismiss the suit. Rather, it is only the "power to 'bring the Government's views to the attention of the court.'" *Laidlaw*, 528 U.S. at 209 n.2 (Scalia, J., dissenting) (citation omitted). Further, if the private plaintiff wants to settle with the defendant, the Attorney General and Administrator are entitled to only a 45-day review period "following the receipt of a copy of the proposed consent judgment." 33 U.S.C. § 1365(c)(3). They lack final decision-making authority over the proposed consent judgment. This scheme inverts the way the public and private entities are supposed to interact. To survive private nondelegation doctrine scrutiny, "the private party's recommendations . . . cannot go into effect without an agency's say-so[.]" *Consumers' Rsch.*, 606 U.S. at 695 (citation omitted). Once a citizen suit is filed, however, it is the government who makes recommendations and the private plaintiffs who retain the say-so.

The CWA's so-called "diligent prosecution bar" does not remedy the constitutional defects of the statute's citizen suit provision. That bar prevents a citizen plaintiff from filing suit "if the Administrator or State has commenced and is diligently prosecuting a [CWA] civil or criminal action." 33 U.S.C. § 1365(b)(1)(B). But critically, the EPA Administrator has only "sixty days" to exercise this authority "after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator." *Id.* § 1365(b)(1)(A). If the government does not sue before the citizen plaintiff or at all—which is what happened here—then it lacks final authority over the citizen suit. Therefore, the argument against the constitutionality of the CWA's citizen suit provision is even stronger here than the analogous argument recently and successfully advanced against the private Financial Industry Regulatory Authority ("FINRA"). The D.C. Circuit preliminarily enjoined FINRA from expelling a member prior to review by the Securities and Exchange Commission ("SEC") because "SEC review can come only after, not before, the expulsion [from FINRA] takes effect," which would be "too little too late." *Alpine Secs. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1326 (D.C. Cir. 2024), *cert. denied*, 145 S. Ct. 2751 (2025). But with the CWA, there is no supervisory role for any federal actor once the citizen suit has been filed.

Although *Consumers' Research* held that there was no private nondelegation doctrine violation, its facts only serve to underscore how far citizen suits are from satisfying this doctrine. The Court upheld a delegation from the Federal Communications Commission to the private Universal Service Administrative Company, which served as Administrator for the Universal Service Fund. Whereas "the Administrator is broadly subordinate to the" FCC because the "FCC appoints the Administrator's Board of Directors and approves its budget," here, Plaintiff self-appoints and approves its own case budget. *Consumers' Rsch.*, 606 U.S. at 692–93 (citation

omitted). Further, the "Administrator makes the initial projections" and "estimates the programs' cost," which the FCC reviews "and either revises or approves." *Id.* at 693–94. Thus, the FCC was the entity making the final decision. In contrast, citizen plaintiffs do not recommend how CWA suits should proceed. Instead, they litigate cases independent from EPA's authority and surveillance. "In every way that matters to the constitutional inquiry, [Plaintiff], not the [EPA], is in control." *Id.* at 695.

The private delegation violation is made worse by the CWA's citizen suit provision because, in addition to foreclosing direct Presidential control, § 1365 "also forecloses certain indirect methods of Presidential control" by allowing Plaintiff "receipt of funds outside the appropriations process." *Seila Law*, 591 U.S. at 225–26. "The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies." *Id.* (citing U.S. Const. art. I, § 7, cl. 2; *id.* art. II, § 3). Although "Presidents frequently use these budgetary tools 'to influence the policies of independent agencies,'" "no similar opportunity exists for the President to influence" plaintiffs' pursuit of citizen suits. *Id.* (citation omitted). For example, if EPA or DOJ exercise discretion contrary to his wishes, the President can limit their funding through a budget bill veto. Plaintiff, however, is immune from this pressure because it self-funds.

Enforcing the private nondelegation doctrine to dismiss the Complaint also would further the rationale behind vesting the executive power in the sovereign alone. The Framers took the "sword out of private hands and turn[ed] it over to an organized government, acting on behalf of all the people." *Robertson v. U.S. ex rel. Watson*, 560 U.S. 272, 282–83 (2010) (Roberts, C.J., dissenting from the dismissal of a writ of certiorari); *see also* 4 Blackstone, *supra*, at *7–8 ("In a state of society this right is transferred from individuals to the sovereign power."); Locke, *supra*,

at §§ 88–89, pp. 55–56 ("every man who has entered into civil society . . . has thereby quitted his power to punish offences" and has "quit . . . his executive power"). This occurred to prevent self-interested, private individuals from using "the power of human punishment" for their own ends. 4 Blackstone, *supra*, at *7–8 ("whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy"); *see Carter Coal*, 29 U.S. at 311 (delegation to "private persons" was unconstitutional because they were not "disinterested"); Locke, *supra*, at § 90, p. 56 ("[C]ivil society [sought] to avoid, and remedy those inconveniences of the state of nature, which necessarily follow from every man's being judge in his own case, by setting up a known authority, to which every one of that society may appeal upon any injury received, or controversy that may arise[.]"). But with its enactment of § 1365, Congress undid the Framers' careful designs and gave the sword back to private individuals.

Further, this diffusion of executive power, and vesting of it in citizen plaintiffs who are not accountable to the President, impairs the liberty and accountability the separation of powers was meant to secure. *Ass'n of Am. R.R.s*, 575 U.S. at 57 (Alito, J., concurring) ("Liberty requires accountability. . . . [But] [o]ne way the Government can regulate without accountability is by passing off a Government operation as an independent private concern."); *Black*, 53 F.4th at 880 ("If . . . people outside government could wield the government's power—then the government's promised accountability to the people would be an illusion." (citations omitted)); Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 391 (1990).

Plaintiff does not merely give advice, assistance, and recommendations to EPA, it does not function subordinately to EPA, and it is not subject to EPA's authority and surveillance such that EPA retains decision-making power. *Consumers' Rsch.*, 606 U.S. at 692; *see also Alpine*, 121 F.4th at 1325; *Black*, 53 F.4th at 889–90 (citations omitted) (holding Horseracing Integrity and Safety

Act violated private nondelegation doctrine because government agency "cannot unilaterally change" or "second-guess" private entity's enforcement decisions). For these reasons, the CWA's citizen suit provision and Plaintiff's pursuit of this suit violate the private nondelegation doctrine.[5]

IV. Congress Violated the Appointments Clause

By creating CWA citizen suits, Congress violated the separation of powers by allowing private citizens to exercise significant governmental authority contrary to the Appointments Clause. The Clause by default requires the President to nominate and the Senate to confirm all "Officers of the United States," while allowing an exception for "inferior Officers" whose appointment Congress has "by Law vest[ed] . . . in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. This arrangement "prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991). An individual is an "officer" requiring appointment under the Appointments Clause when he (1) "exercise[es] significant authority pursuant to the laws of the United States"; and (2) "occupies a 'continuing' position established by law." *Lucia v. SEC*, 585 U.S. 237, 245 (2018) (quoting *Buckley*, 424 U.S. at 126 (first prong); *United States v. Germaine*, 99 U.S. 508, 511 (1879) (second prong)) (cleaned up).

The first prong's requirements are established by the prior sections on the Executive Vesting and Take Care Clauses, and this argument need not be repeated here in full. It suffices to

[5] Defendant acknowledges that multiple district courts have rejected constitutional arguments against CWA citizen suits. *See, e.g.*, *Patterson v. Barden & Robeson Corp.*, No. 04-cv-803, 2007 WL 542016, at *8 (W.D.N.Y. Feb. 16, 2007); *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., L.L.C.*, 200 F. Supp. 2d 551, 555–56 (E.D.N.C. 2001); *Chesapeake Bay Found., Inc. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 623–26 (D. Md. 1987); *Student Pub. Interest Rsch. Grp. of N.J., Inc. v. Monsanto Co.*, 600 F. Supp. 1474, 1478–79 (D.N.J. 1985). But none of these non-binding opinions, issued decades ago with sparse legal analysis, involved a private nondelegation doctrine argument, much less Defendant's history and text-based arguments. Moreover, they lacked the benefit of the Supreme Court's most recent separation of powers cases, such as *Seila Law*, *Collins*, and *Trump*.

say that Plaintiff exercises "significant authority" by "conducting civil litigation in the courts of the United States for vindicating public rights[.]" *Buckley*, 424 U.S. at 140 ("Such functions may be discharged only by persons who are 'Officers of the United States' within the language of" the Appointments Clause). Further, Plaintiff exercises "significant authority" by pursuing "daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power." *Seila Law*, 591 U.S. at 219. Courts also consider "significant authority" to exist when an actor "'exercise[s] significant discretion,'" *Lucia*, 585 U.S. at 245, 247–48 (citation omitted), which occurs here because Plaintiff "possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *Texas*, 599 U.S. at 678 (citations omitted). These powers distinguish CWA citizen suits from *United States ex rel. Taxpayers Against Fraud v. General Electric Co.*, where the Sixth Circuit rejected an Appointments Clause challenge to the FCA's *qui tam* provision. 41 F.3d 1032, 1041 (6th Cir. 1994) ("[T]he relator is not vested with governmental power."). *But see Zafirov*, 751 F. Supp. 3d at 1310 (criticizing and declining to follow *Taxpayers Against Fraud*). Further, the Sixth Circuit upheld the FCA's *qui tam* provision in part because—unlike with CWA citizen suits—"the government may take complete control of the case if it wishes." *Taxpayers Against Fraud*, 41 F.3d at 1041. And, unlike those who are non-officers, Plaintiff does not operate in an "advisory" role and make "only non-binding recommendations." *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 761 (2025). Thus, the first prong is met.

The second prong also is met because Plaintiff "occup[ies] a 'continuing' position established by law." *Lucia*, 585 U.S. at 245 (quoting *Germaine*, 99 U.S. at 511). This prong "stress[es] 'ideas of tenure [and] duration'" and asks whether the putative officer's statutory duties are "'occasional or temporary' rather than 'continuing and permanent.'" *Id.* (quoting *Germaine*,

99 U.S. at 511–12). This inquiry "embraces the ideas of tenure, duration, emoluments, and duties" as set out in the relevant statute. *Germaine*, 99 U.S. at 511.

Here, this test is met because the statute identifies the office's duties, including that the citizen plaintiff must give sixty days' notice "of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order[.]" 33 U.S.C. § 1365(b)(1)(A). Its powers are that it can "commence a civil action . . . against any person . . . alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation" and seek "any appropriate civil penalties." *Id.* § 1365(a). Further, "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action . . . to require compliance with the standard, limitation, or order," the citizen plaintiff "may intervene as a matter of right." *Id.* § 1365(b)(1)(B). Finally, § 1365(d) gives "any prevailing or substantially prevailing" citizen plaintiff an emolument of "costs of litigation (including reasonable attorney and expert witness fees)."[6]

The notion that Plaintiff "occupies a continuing position" is bolstered by the fact that, since 2018, it has filed twenty-five CWA citizen suits in the Eastern[7] and Middle[8] Districts of Tennessee.

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[6] This Court can hold that Plaintiff occupies a continuing position even if not all factors are met. For example, the Supreme Court recently held that members of the Preventative Services Task Force are officers even though "[t]hey serve on a volunteer basis" and "are not paid by the Federal Government." *Braidwood*, 606 U.S. at 755.

[7] *Tenn. Riverkeeper, Inc. v. City of Maynardville*, No. 3:25-cv-208; *Tenn. Riverkeeper, Inc. v. City of Manchester*, No. 4:20-cv-34; *Tenn. Riverkeeper, Inc. v. Hamilton Cnty. Wastewater Treatment Auth.*, No. 1:18-cv-254; *Tenn. Riverkeeper, Inc. v. City of Oak Ridge*, No. 3:18-cv-374.

[8] *Tenn. Riverkeeper, Inc. v. City of Spring Hill*, No. 1:25-cv-74; *Tenn. Riverkeeper, Inc. v. Town of Monterey*, No. 2:25-cv-66; *Tenn. Riverkeeper, Inc. v. Town of Chapel Hill*, No. 1:24-cv-50; *Tenn. Riverkeeper, Inc. v. City of Celina*, No. 2:24-cv-79; *Tenn. Riverkeeper, Inc. v. Barnes*, No. 3:24-cv-113; *Tenn. Riverkeeper, Inc. v. Waste Connections of Tenn.*, No. 3:24-cv-883; *Tenn. Riverkeeper, Inc. v. Tweden*, No. 3:24-cv-886; *Tenn. Riverkeeper, Inc. v. Town of Kingston Springs*, No. 3:24-cv-1241; *Tenn. Riverkeeper, Inc. v. BGC Dev., LLC*, No. 3:24-cv-1461; *Tenn. Riverkeeper, Inc. v.*

Essentially, it "acts as a self-appointed mini-EPA." *See Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting). This continuing nature of Plaintiff's enforcement actions further distinguishes CWA citizen suits from *Taxpayers Against Fraud*, 41 F.3d at 1041 ("Furthermore, the relator's 'position is without tenure, duration, continuing emolument, or continuous duties.'" (quoting *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890))). If multiple courts have held that an individual who temporarily pursues a single case can be an officer, *Morrison v. Olson*, 487 U.S. 654, 671 n.12 (1988) (independent counsel); *United States v. Donziger*, 38 F.4th 290, 297 (2d Cir. 2022) (special prosecutors appointed by district courts); *In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019) (special counsel); *In re Sealed Case*, 829 F.2d 50, 56–57 (D.C. Cir. 1987) (independent counsel), then a litigant who continually exists to file twenty-five enforcement actions over eight years qualifies as an officer.

For example, the Second Circuit has applied a three-part test to determine "whether a temporary position is an office[r]," holding that special prosecutors appointed by district courts were Officers. *Donziger*, 38 F.4th at 297. This test is whether "(1) the position is not personal to a particular individual; (2) the position is not transient or fleeting; and (3) the duties of the position are more than incidental." *Id.* (citation omitted). The first prong is met because the office of citizen suit plaintiff is not personal to Plaintiff, which is underscored by the fact that Plaintiff is a nonprofit corporation; if it withdrew, the suit still could be prosecuted by one or more of its members. *See* Compl. ¶¶ 11–13. Second, the position is not transient or fleeting, as citizen suits often do last

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Afrakhteh, No. 3:23-cv-749; *Tenn. Riverkeeper, Inc. v. Ray*, No. 3:23-cv-878; *Tenn. Riverkeeper, Inc. v. City of Lebanon*, No. 3:23-cv-1369; *Tenn. Riverkeeper, Inc. v. City of Lewisburg*, No. 1:22-cv-28; *Tenn. Riverkeeper, Inc. v. City of Cookeville*, No. 2:22-cv-44; *Tenn. Riverkeeper, Inc. v. City of Sparta*, No. 2:22-cv-46; *Tenn. Riverkeeper, Inc. v. City of McEwen*, No. 3:22-cv-919; *Tenn. Riverkeeper, Inc. v. City of Lawrenceburg*, No. 1:20-cv-52; *Tenn. Riverkeeper, Inc. v. City of Clarksville*, No. 3:20-cv-68; *Tenn. Riverkeeper, Inc. v. City of Pulaski*, No. 1:18-cv-61; *Tenn. Riverkeeper, Inc. v. Ashland City*, No. 3:18-cv-233.

multiple years. Third, suing to vindicate public rights and to recover civil penalties payable to the U.S. Treasury is "more than incidental to regular government operations." *Donziger*, 38 F.4th at 298. Indeed, government exists mainly to vindicate public rights and pursue such public remedies.

For these reasons, Plaintiff "occupies a continuing position" and, thus, satisfies the second step for officer status. But Plaintiff has not been appointed to its office consistent with the Appointments Clause, nor does the CWA require that it be so appointed. Thus, § 1365 violates the Appointments Clause, and the Court should dismiss Plaintiff's Complaint.

V. CWA Citizen Suits Have No Basis in History or Tradition

Besides examining specific clauses of Article II to determine whether Congress has violated the separation of powers, the Supreme Court considers as relevant whether a Congressional enactment lacks a historical precedent to support it. According to this criterion, CWA citizen suits are unconstitutional because they are "an innovation with no foothold in history or tradition." *Seila Law*, 591 U.S. at 222. "Perhaps the most telling indication of the severe constitutional problem with [CWA citizen suits] is the lack of historical precedent for" them. *Free Enter. Fund*, 561 U.S. at 505 (citation omitted). Recently, the Court confirmed that citizen suits have no foothold in history or tradition: "until the 20th century, Congress rarely created 'citizen suit'–style causes of action for suits against private parties by private plaintiffs . . . . The situation has changed markedly, especially over the last 50 years or so." *TransUnion*, 594 U.S. at 428 n.1. Their status as "a historical anomaly" provides additional evidence as to why there are violations of the above-discussed clauses and private nondelegation doctrine. *Seila Law*, 591 U.S. at 220, 222 (finding "CFPB's single-Director structure" was unconstitutional because it was "almost wholly unprecedented" and "an innovation with no foothold in history or tradition"); *see also Arthrex*, 594 U.S. at 21 (finding lack of supervision over Patent Trial and Appeal Board unconstitutional because it had "no 'foothold in history or tradition'" (citation omitted)).

Far from there being a tradition of private citizens exercising executive power, there has been since the Founding a tradition of the Executive pursuing public remedies to vindicate public rights and having discretion over such suits. *See supra* pp. 4–13. This tradition was confirmed by the Supreme Court in the nineteenth century. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329–30 (1816) ("The second article declares that 'the executive power *shall be vested* in a president of the United States of America.' Could congress vest it in any other person . . . ? It is apparent that such a construction . . . would be utterly inadmissible."); *Confiscation Cases*, 74 U.S. 454, 457 (1868) (noting the "[s]ettled rule" that "civil or criminal" suits cannot proceed "for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business, in his absence, as may appertain to the duties of his office"). This understanding continued in the twentieth century, *Buckley*, 424 U.S. at 139; *Printz*, 521 U.S. at 922–24, and remains the law today. *All. for Hippocratic Med.*, 602 U.S. at 382; *Texas*, 599 U.S. at 684; *id.* at 689 (Gorsuch, J., concurring in judgment).

Any contention that citizen suits pass constitutional muster because, as *TransUnion* acknowledged, they have been included in federal statutes over the last fifty years, must be rejected. A court's "inquiry is sharpened rather than blunted by the fact that [citizen suit] provisions are appearing with increasing frequency in statutes which delegate authority to" private plaintiffs to wield executive power. *INS v. Chadha*, 462 U.S. 919, 944 (1983); *see also Seila Law*, 591 U.S. at 222–23 (cautioning that the expansion "into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people" (citation omitted)).

Indeed, due to the nature of Congress's constitutional powers, it is unsurprising that it can take more than a half-century for novel Congressional enactments to be found unconstitutional.

Because Congress's powers are "'at once more expansive and less susceptible of precise limits, it can with the greater facility mask under complicated and indirect measures the encroachments which it makes on the co-ordinate departments.'" *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273–74 (1991) (quoting The Federalist No. 48, at 332–34) (James Madison) (J. Cooke ed. 1961)). Congress has encroached on the Executive Branch by creating CWA citizen suits, which have no "foothold in history or tradition," a consideration that points to a separation of powers violation.

CONCLUSION

Although the Constitution envisions checks against the excessive application of executive power, CWA citizen suits eviscerate these checks by violating numerous constitutional provisions. Any role private plaintiffs may have in the enforcement of environmental law is constitutionally limited to seeking private remedies for alleged private wrongs. But Congress did not structure the CWA that way. Instead, Plaintiff's citizen suit is an exercise of Article II's executive power, which Plaintiff has no right to wield. The Constitution does not accommodate Congress and private plaintiffs second-guessing the Executive's enforcement decisions through litigation that subjects a defendant to executive power. If Congress believes under-enforcement of the CWA to be a problem, "other forums remain open for examining the Executive Branch's" purported lack of diligence. *Texas*, 599 U.S. at 685. "For example, Congress possesses an array of tools to analyze and influence those policies—oversight, appropriations, the legislative process, and Senate confirmations, to name a few. And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions." *Id.* (citation omitted). Because CWA citizen suits violate the Constitution's Executing Vesting, Take Care, and Appointments Clauses, as well as the private nondelegation doctrine, the Court should

grant the motion to dismiss and award Defendant its "costs of litigation (including reasonable attorney . . . fees)" as the "prevailing party." 33 U.S.C. § 1365(d).

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Respectfully submitted,

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**Pro hac vice application filed*

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2025, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which is understood to have sent notification of such filing electronically to all counsel of record.

/s/Jonathan Swann Taylor
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Attorney for Defendant