No. 10-1062

IN THE

Supreme Court of the United States

CHANTELL SACKETT AND
MICHAEL SACKETT,
Petitioners

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,
Respondents

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF *AMICUS CURIAE* OF NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. May petitioners seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U. S. C. §704?

2. If not, does petitioners' inability to seek pre-enforcement judicial review of the administrative compliance order violate their rights under the Due Process Clause?

Amicus curiae National Association of Manufacturers will address the second question.

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INTEREST OF AMICUS[1]

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to United States' economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Many of NAM's members have been, or potentially will be, subject to administrative orders issued by the Environmental Protection Administration ("EPA") under statutes which

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. Copies of those consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

authorize EPA to issue administrative orders as an enforcement measure.

STATEMENT OF THE CASE

Petitioners Chantell and Michael Sackett ("the Sacketts" or "Petitioners") own a 0.63-acre undeveloped lot in Idaho near Priest Lake. In April and May of 2007, the Sacketts filled in about one half acre of that property with dirt and rock in preparation for building a house. *Sackett v. U.S. E.P.A.*, 622 F.3d 1139, 1141 (9th Cir. 2010); Petitioners' Appendix to their Petition for Certiorari (hereafter "Pet.App.") A-2.

On November 26, 2007, the EPA issued a compliance order ("Order") against the Sacketts. The Order alleged that the Sacketts' parcel is a wetland subject to the Clean Water Act ("CWA") pursuant to sections 308 and 309(a) of the Water Pollution Control Act (Clean Water Act) ("CWA" or the "Act"), 33 U.S.C. §§ 1318 and 1319(a) (1988). The Order charged that the Sacketts had violated section 301 of the CWA, 33 U.S.C. § 1311, by discharging fill material into regulated waters without first obtaining a permit and required the Sacketts to remove the fill material and restore the wetlands, and set a schedule for the removal of the

fill material and replanting of vegetation in the "disturbed area." 622 F.3d at 1141; Pet. App. A-2-A-3.

The Order further stated that "[v]iolation of, or failure to comply with, the foregoing Order may subject Respondents to (1) civil penalties of up to $32,500 per day of violation[2] . . . [or] (2) administrative penalties of up to $11,000 per day for each violation." 622 F.3d at 1141; Pet.App. A-3.

The Sacketts sought a hearing with the EPA to challenge the finding that the Parcel is subject to the CWA. EPA did not grant the Sacketts a hearing and continued to assert CWA jurisdiction over the Parcel. 622 F.3d at 1141; Pet.App. A-3.

The Sacketts then filed an action in the United States District Court for the District of Idaho seeking injunctive and declaratory relief. They challenged the compliance order as (1) arbitrary and capricious under the Administrative Procedure Act("APA"), 5 U.S.C. § 706(2)(A); (2) issued without a hearing in violation of the Sacketts' procedural due process rights; and (3) issued on the basis of an "any information

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[2] As noted *supra*, n. 4, the maximum per-day penalty amount increased to $37,500 effective January 12, 2009. 40 C.F.R. § 19.4. S*ee* 622 F.3d at n.3 ; Pet. App. A-5.

available" standard that is unconstitutionally vague. 622 F.3d at 1141; Pet.App. A-3.

The district court granted the EPA's Fed.R.Civ.P. 12(b)(1) motion to dismiss the Sacketts' claims for lack of subject-matter jurisdiction, concluding that the CWA precludes judicial review of compliance orders before the EPA has started an enforcement action in federal court. The Sacketts filed a Fed.R.Civ.P. 59(e) motion for clarification and reconsideration that was also denied. 622 F.3d at 1141; Pet App. A-3-4.

The Sacketts appealed the dismissal to the Ninth Circuit. Despite the general presumption of judicial review of administrative actions, that court held that "the Clean Water Act precludes pre-enforcement judicial review of administrative compliance orders, and that such preclusion does not violate due process." 622 F.3d at 1141; Pet. App. A-2.

SUMMARY OF ARGUMENT

Many environmental laws, including the specific law at issue in this case, the Clean Water Act, 33 U.S.C. § 1319, authorize the EPA to issue compliance orders to alleged violators of those

laws.[3,4] Refusal to obey a compliance order is a violation of each respective statute, and subjects parties who disobey the compliance order to severe civil and criminal penalties.

Unless the party receiving a compliance order can obtain judicial review of the compliance order, the alleged violator cannot challenge the order until the EPA commences an enforcement action, by which time substantial penalties – as much as $37,500 *per day* -- can accrue.[5] The dynamics of this scheme effectively coerce the alleged violator

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[3] A compliance order "is a document served on the violator, setting forth the nature of the violation and specifying a time for compliance with the Act." (Pet. App. A4, citation omitted). Violation of a compliance order carries the potential for significant civil or even criminal sanctions. *See* 622 F.3d at 1141; Pet.App. A-3; Pet.App. G-7.

[4] *See also* Clean Air Act, 42 U.S.C. § 7413(a) (Supp. III 1991); Solid Waste Disposal Act (Resource Conservation and Recovery Act), 42 U.S.C. § 6928 (1988); Safe Drinking Water Act, 42 U.S.C. §§ 300g-3(g), 300h-2(c) (1988); Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606(a) (1988).

[5] The Amended Compliance Order in this case (Pet. App. G1, *et seq*.), dated May 15, 2008, recites that civil penalties of up to $32,500 per day of violation will accrue (Pet. App. G-7), but the maximum per-day penalty amount increased to $37,500 effective January 12, 2009. 40 C.F.R. § 19.4. (*See* Pet. App. A-5).

into compliance, whatever the merits of the claim of violation underlying the order.

Several courts of appeal which have addressed the issue, including the Ninth Circuit in this case, have ruled that judicial review of compliance orders is not available, based on the doctrines of statutory preclusion and "finality" or "ripeness." Without judicial review, the compliance order may become an instrument of intimidation, denying the object of the compliance order due process.[6]

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[6] Courts applying "statutory preclusion" have held that the environmental statute authorizing the compliance order precludes judicial review. (*See* Pet. App. A6-A7). Under the Administrative Procedure Act (APA), judicial review of agency action is limited by the extent to which the relevant statute precludes review. 5 U.S.C. § 701(a)(1) (1988). The APA also denies judicial review if the "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). For application of the "committed to agency discretion" provision, *see Heckler v. Chaney,* 470 U.S. 821 (1985), and *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). This Court has applied both explicit and implied statutory preclusion. *See Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). In the case of compliance orders, the lower courts have construed the history, structure, and language of the relevant statute to imply an intent by Congress to preclude direct actions challenging compliance orders. However, even post-*Block*, a number of this Court's decisions suggest that the "clear and convincing standard" of *Abbott Laboratories v. Gardner,* 421 U.S. 560 (1975) is still the standard. *See, e.g.*, *United States v. Fausto,* 484 U.S. 439, 452 (1988)

Pre-enforcement access to the courts is a critical check on agency abuse of the enforcement process and to protect the recipient from the practical effects of threatened penalties. Without judicial review at the time the order is issued, the recipient faces a dilemma: either comply with the order at substantial expense and perhaps irreversible injury to the recipient's property and liberty rights, or risk the potential imposition of heavy penalties for noncompliance if the order is sustained in a subsequent EPA enforcement action. EPA's decision whether and when to bring an enforcement action is entirely discretionary, and delay by the agency will result in accrual of massive monetary penalties.

("Congress will be presumed to have intended judicial review of agency action unless there is persuasive reason' to believe otherwise."); *Japan Whaling Ass'n v. American Cetacean Soc'y,* 478 U.S. 221, 230 n.4 (1986) (a cause of action for review of agency action is available "absent some clear and convincing evidence of legislative intention to preclude review."); *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670 (1986) ("We begin with the strong presumption that Congress intends judicial review of agency action."); *Lindahl v. Office of Personnel Management,* 470 U.S. 768, 778 (1985) ("We have often noted that only upon a showing of clear and convincing evidence 'of a contrary legislative intent' should the courts restrict access to judicial review." (quoting *Abbott Laboratories v. Gardner,* 421 U.S. 560, 568 (1975)).

The text of the enforcement provision, "any person who violates any order issued by the Administrator under [33 U.S.C. § 1319(a)], shall be subject to a civil penalty . . . for each violation." 33 U.S.C. § 1319(d), suggests that Respondents (as they are designated in the Order (*see* (Pet. App. G-1, *et seq*.)), risk substantial financial penalties for violating the Order, even if they did not violate the CWA, if the EPA establishes in an enforcement proceeding that the compliance order was validly issued based on "any information available." *See Tennessee Valley Authority v. Whitman*, 336 F.3d 1236, 1259 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004).

In this case, the Ninth Circuit found that to obtain a judicial hearing the Sacketts could either (I) apply for a permit to discharge pollution into the navigable waters of the United States (at substantial cost), and then seek judicial review if a permit were denied (but with no prospect of recovering the costs of any such application), or (ii) ignore the Order, and run the risk of immense fines and possibly even criminal prosecution[7], and

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[7] Criminal penalties are available under 33 U.S.C. § 1319(c).

contest the compliance order in an enforcement action.

This "intolerable choice" (*Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994)) violates the constitutional requirements of due process of law.

ARGUMENT

I.

THE CLEAN WATER ACT, AS INTERPRETED BY THE NINTH CIRCUIT, DEPRIVES CITIZENS OF DUE PROCESS OF LAW

The Sacketts have been undeniably denied a property interest. They purchased a residential lot in a residential neighborhood for the purpose of building a home. They have been denied the right to build a home on their property for years, and perhaps in perpetuity. EPA has already determined that preparing the land for the building of a home involves discharge of pollution into the navigable waters of the United States.

This Court recognized long ago that "property" defined in the "ordinary, everyday sense[]" is not only the tangible "thing which is the subject of

ownership" but also "the owner's [intangible] right to control and dispose of that thing." *Crane v. Comm'r,* 331 U.S. 1, 6 (1947).[8] The Order in this case required Respondents to "provide any successor in ownership, control, operation, or any other interest in all or part of the Site, a copy of this Order at least 30 days prior to the transfer of such interest. In addition, Respondents shall simultaneously notify the EPA representative identified in Paragraph 2.8 in writing that the notice required in this Section was given. No real estate transfer or real estate contract shall in anyway affect Respondent's obligation to comply fully with the terms of this Order" (Pet. App. G-6), thus effectively proscribing the sale or mortgaging

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[8] Any argument that the issuance of an Order does not amount to a deprivation of an important right is belied by *Connecticut v. Doehr,* 501 U.S. 1 (1991), which makes it clear that it is not only the physical seizure of property that deprives a person of possession and use of the property, but that impairment of the right to use or dispose of the property is also a constitutionally recognized deprivation. In his concurring opinion, Justice Rehnquist emphasized the Courts unanimous recognition that the pre-judgment attachment statute in *Doehr* does not deprive the defendant of the use or possession of the property. *Doehr*, 501 U.S. at 26 (Rehnquist, J., concurring). Justice Rehnquist noted that "a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its value to him. *Id.* at 28.

of the property, or at least severely reducing its sale or loan value.

An Order thus causes an immediate, unavoidable, and substantial pre-hearing deprivation of constitutionally protected property interests, whether the Respondent complies with the Order or not.

Further, it cannot be disputed that a Respondent who complies with an Order suffers deprivations through the costs imposed by the Order. These deprivations occur prior to any hearing and are substantial.

Contrary to the Ninth Circuit's suggestion (*see* 622 F.3d at 1146; Pet.App. A-13) that Recipients can vindicate their rights through the permitting process, under EPA regulations the Recipient of an Order cannot even apply for a permit because once an Order has been issued "[n]o permit application will be accepted" until the Compliance Order has been resolved. 33 C.F.R. § 326.3(e)(1)(ii). Thus Recipients cannot avail themselves of this option without expending substantial sums. Moreover, the costs and delays inherent in the permit application process are prohibitive: the average application for an individual permit costs $271,596 and takes more than two years to be issued. *See Rapanos v. United States,* 547 U.S. 715, 721 (2006)

(plurality opinion). Furthermore, there is no certainty that the permit would be granted, or, if granted, not be burdened with impracticable or economically unreasonable conditions.

Further, if a Recipient then had to sue to have her objections heard by a court, and the court ruled that the EPA's Order was factually incorrect or beyond EPA's jurisdiction, the Recipient would not be able to recover the permit application costs.[9]

Alternatively, a Recipient could refuse to comply with the Order and seek to raise their defenses when the EPA sued to enforce it. That course entails incurring EPA fines of as much as $1,250,000 per month, or $13,500,000 per year, for failure to comply with the Order. The Recipient must await EPA's commencement of an enforcement action, which EPA can file at its sole discretion as late as five years after the date of the "violation" (*see* 28 U.S.C. § 2462) while the penalties accumulate. If EPA delayed filing the enforcement action for even a year or two, the accumulated penalties would be enough to

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[9] As Justice Scalia recognized in *Thunder Basin Coal Co. v. Raich,* 510 U.S. 200, 220-21 (1994)(concurring in part and concurring in the judgment), "[C]omplying with a regulation later held to be invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."

bankrupt even the truly wealthy.[10] Moreover, under the CWA, the Recipient runs the risk of criminal liability as well, as Section 1319(c)(1)-(2) imposes criminal penalties for knowing violations of the Act. *See* 622 F.3d at 1144; Pet.App. A-4.[11] It

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[10] These horrific numbers are not purely imaginary or hypothetical, given the typical time a federal court case takes from filing to judgment and exhaustion of appeals.

[11] EPA could impose administrative penalties, in which case the property owner also must exhaust administrative remedies before judicial review is available. 33 U.S.C. § 1319(g); 33 C.F.R. §§ 331.10, 331.12. When the EPA assesses an administrative penalty, the alleged violator is entitled to "a reasonable opportunity to be heard and to present evidence," the public is entitled to comment, and any assessed penalty is subject to immediate judicial review. 33 U.S.C. § 1319(g)(4), (8). *See* 622 F.3d at 1142; Pet.App. A-4. However, the initial hearing would be before the same person or entity that imposed the penalty, not a neutral decision-maker. The constitutional requirement of some kind of hearing means, at a minimum, that the affected individual must have a meaningful opportunity to present his case before a neutral decision maker. *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) and *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970)). "Before one may be deprived of a protected interest ... one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 617-18 (1993); *see also Hamdi v. Rumsfeld,* 542 U.S. 507, 533 (2004) ("due process requires a neutral and detached

is not certain that in an enforcement action a court would permit the Recipient to raise defenses to the Compliance Order, a "right" the Ninth Circuit read into the CWA, when the plain language of the statute unambiguously precludes it, nor is there any assurance that a later court in such an enforcement action would disallow or substantially reduce any fine on equitable grounds.[12]

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judge in the first instance") (quoting *Concrete Pipe).* Even if the procedure for appeal of a civil penalty were constitutionally adequate, that is not the path the EPA chose in this case.

[12] This Court ruled in *Ex Parte Young,* 209 U.S. 123, 148 (1908) that requiring a party to bear "the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts" would be unconstitutional because it would effectively "close up all approaches to the courts." Recently, this Court again ruled in *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 129 (2007) that "Given this genuine threat of enforcement, we did not require, as a prerequisite to testing the validity of the law in a suit for injunction, that the plaintiff bet the farm, so to speak, by taking the violative action." *See also Thunder Basin,* 510 U.S. at 216, where this Court concluded that lack of judicial review is unconstitutional where "the practical effect of coercive penalties for noncompliance is to foreclose all access to the courts," and where "compliance is sufficiently onerous and coercive penalties sufficiently potent."

The impossible choices faced by a Recipient are similar to those the Eleventh Circuit in *TVA v. Whitman, supra,* found the EPA's Compliance Order procedure under a completely analogous provision of the Clean Air Act to be an unconstitutional violation of the Due Process Clause. In *TVA v. Whitman*, the EPA issued a Compliance Order against the Tennessee Valley Authority (TVA) under the Clean Air Act. The Eleventh Circuit recognized that compliance orders have the force of law independent of the statute, and impose liabilities for their violation apart from the statute. Thus the language of the CAA provided no basis for the TVA to challenge the compliance order and raise defenses to it. The Eleventh Circuit recognized that enforcement of the Compliance Order would involve an unconstitutional infringement of the Due Process Clause.[13]

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[13] Respondents recognize that the reasoning of *TVA* decimates their argument. They note that "[i]n *TVA*, the Solicitor General filed a petition for a writ of certiorari on behalf of EPA, arguing that the court in a suit to enforce a CAA compliance order may inquire into the validity of the order. . . .This Court denied the petition. 541 U.S. 1030 (2004)." Brief for the Respondents in Opposition [to the petition in this case], at 13, n.3. Although Respondents allude to "differences" in the statutory language of CWA

The Ninth Circuit recognized that the same problem arises in the present case. If the Sacketts want to challenge the Compliance Order rather than comply with it, they would bear penalties for violating it. But the Ninth Circuit reasoned that the statutory language was not "a model of clarity," and could be interpreted to avoid unconstitutionality by reading into the statute a right for the Sacketts to raise their defenses to the Compliance Order after the EPA moved for enforcement.

The Ninth Circuit's reliance on *Thunder Basin* is misplaced. The Ninth Circuit failed to recognize critical distinctions between *Thunder Basin* and this case, and between the procedures under the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801, *et seq*. (the "Mine Act") and those the Ninth Circuit determined are available under the CWA. In *Thunder Basin* the mine operator sought judicial review of "an anticipated citation and penalty." *Thunder Basin,* 510 U.S. at 206, even before the Mine Safety and Health Administration ("MSHA") district manager had sent a letter instructing the operator to

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and the Clean Air Act at issue in *TVA*, they do not explain what those differences may be, or how they affect the applicability of *TVA*'s holding to this case.

comply with the Mine Act. *Id*. at 205. This case concerns a deprivation of property rights prior to any hearing: the Sacketts received an Order that already made findings of fact, reached conclusions of law and imposed a "remedy" requiring them to undertake expensive remediation of their property before they sought judicial intervention.

Moreover, the procedure under the Mine Act at issue in *Thunder Basin* is quite different from the process a Recipient is afforded by the CWA. Under the Mine Act, a mine operator may challenge an order within 30 days of receipt, receive a hearing before an independent administrative law judge, 30 U.S.C. § 815(a), and thereafter appeal to the Federal Mine Safety and Health Review Commission. *Thunder Basin Coal Co. v. Martin,* 969 F.2d 970, 973 (10th Cir. 1992) (internal citations omitted). After exhausting these administrative remedies, the operator can then appeal "to a United States court of appeals . . . ." *Id*. As interpreted by the Ninth Circuit, the CWA requires a property owner who receives an order either to comply with the order, submit a permit application, wait for the government to process the permit application, and issue a decision on the application, within EPA's time frame (which, as this Court said in *Rapanos*, *supra*, can exceed two

years), and then seek judicial review, or to wait for the government to file an enforcement action (which can be anytime within five years of issuance of the Order (see *supra* at 12).

The Ninth Circuit invoked the maxim that statutes should be construed, if possible, to avoid substantial constitutional questions is a sufficient ground for rejecting petitioners' interpretation. *See Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *INS* v. *St. Cyr*, 533 U.S. 289, 299-300 (2001). 622 F.3d at 1145; Pet.App.. We submit that as the Eleventh Circuit explained, "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA,* 336 F. 3d at 1255, and because the language of the CWA is not ambiguous, its meaning cannot be stretched to avoid the unconstitutional deprivation of due process of law.

Even if the Ninth Circuit were at liberty to construe the statute in a manner inconsistent with its unambiguous language, that court's interpretation does not cure the constitutional infirmity of deprivation of due process by denial of any pre-deprivation review by an impartial decision-maker.

II.

THE CWA DEPRIVES RECIPIENTS OF COMPLIANCE ORDERS OF THE RIGHT TO DUE PROCESS BECAUSE A RECIPIENT SUFFERS AN IMMEDIATE DEPRIVATION OF PROTECTED PROPERTY INTERESTS WHETHER OR NOT SHE COMPLIES WITH AN ORDER

A major flaw in the Ninth Circuit's reasoning is that it completely ignores the fact that a Recipient who complies with an Order suffers deprivations through the costs imposed by the Order, that these deprivations are unquestionably substantial, and occur prior to any hearing.

A Recipient who believes an Order is unlawful and elects not to comply is immediately burdened by a massive contingent liability that has a correspondingly immediate impact on the Recipient's ability to transfer title to the property or to finance the property and the cost of financing. These pre-hearing deprivations are not merely hypothetical and cannot be disputed.

The Court's analysis of the procedural due process issues raised in this case must start with certain indisputable facts. First, Orders impose

significant immediate deprivations on Recipients, either through the costs compliance, or through the impacts on the Recipient's ability to transfer title, the market value of the property, or the ability to obtain financing and the cost of financing.[14] Second, Recipients do not have any

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[14] This Court recognized long ago that "property" defined in the "ordinary, everyday sense[]" is not only the tangible "thing which is the subject of ownership" but also "the owner's [intangible] right to control and dispose of that thing." *Crane v. Comm'r,* 331 U.S. 1, 6 (1947). *See Peralta v. Heights Med. Ctr., Inc.,* 485 U.S. 80, 85 (1988) (lien that impairs "ability to mortgage or alienate" property imposes a cognizable deprivation). In *Doehr,* 501 U.S. 1 this Court rejected the argument that the attachment did not give rise to an actionable deprivation of property because the "effects do not amount to a complete, physical, or permanent deprivation of real property," explaining that an attachment deprives individuals of protected property interests because it "ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; [or] reduces the chance of obtaining a home equity loan or additional mortgage." 501 U.S. at 11. A does not amount to a deprivation of an important right is belied by *Doehr*. *Doehr* makes it clear that it is not only the seizure of property that deprives the defendant of possession and use of the property. In his concurring opinion, Justice Rehnquist emphasized the Court's unanimous recognition that the pre-judgment attachment statute in *Doehr* does not deprive the defendant of the use or possession of the property. *Doehr*, 501 U.S. at 26 (Rehnquist, J., concurring). Justice Rehnquist noted that "a lienor need not obtain possession or use of real property belonging to a debtor in order to significantly impair its

opportunity for a hearing before a neutral decision-maker to challenge Orders before these deprivations occur. Third, in this case and in most cases, the government has no urgent need to issue Orders that would justify dispensing with the due process requirement of a pre-deprivation hearing.

As the Supreme Court explained in *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) "some sort of hearing is required *before* an individual is finally deprived of a property interest." (Emphasis supplied). "[T]he root requirement of the Due Process Clause" is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542 (1985) (citations omitted); *see also United States v. James Daniel Good Real Prop.,* 510 U.S. 43, 55 (1993). "Although the Court has held that due process tolerates variances in the form of a hearing appropriate to the nature of the case. . . the Court has traditionally insisted that whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes,* 407 U.S. 67, 82 (internal citations and quotations omitted). "Many controversies have

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value to him. *Id.* at 28.

raged about the cryptic and abstract words of the Due Process Clause, but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982). The CWA scheme violates this basic principle, and the explicit or implied post-deprivation remedies expounded by Ninth Circuit do not address the lack of pre-deprivation due process.

The possibility that a Recipient might recover some of its losses in a post-deprivation hearing does not excuse EPA of its obligation to provide Recipients with a hearing before the deprivation occurs. The Supreme Court has held that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone." *Fuentes,* 407 U.S. at 82 (citation omitted and alteration in original). "In situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for

the taking." *Zinermon v. Burch,* 494 U.S. 113, 132 (1990).

The government may avoid the requirement of a pre-deprivation hearing only in extraordinary situations — which are not present here — where immediate government action is "necessary to secure an important governmental or general public interest" and there is a "special need for very prompt action." *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 678 (1974). "[I]t is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate (a protected) interest . . . it must afford notice and opportunity for hearing appropriate to the nature of the case before the termination becomes effective." *Bd. of Regents of State Colls. v. Roth,* 408 U.S. 564, 570, n.7 (1972); *see also James Daniel Good,* 510 U.S. at 53 ("We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.").

Pre-enforcement process may be postponed until after the government deprives a person of his rights, but only in "extraordinary situations where

some valid government interest is at stake that justifies" the postponement. *Boddie v. Connecticut*, 401 U. S. 371, at 379 (1971); *Gilbert v. Homar,* 520 U.S. 924, 930 (1997) ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause."). The required hearing "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965).

a. The "emergency situation" exception does not apply.

Although the Ninth Circuit alluded to Congress' intent to "allow EPA to act to address environmental problems quickly and without becoming immediately entangled in litigation," and "[t]his goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders, (622 F.3d at 1144 (citation omitted); Pet.App. A-8), there is no evidence that any emergency existed in this case, nor does the Order itself even recite that there is a need for immediate action. *See* Pet.App. G-1, *et seq*.

Even if in some cases there is a need for "swift corrective action," EPA does not issue Orders solely or primarily to address environmental emergencies. The CWA does not condition the issuance of an Order on a finding of a need for "swift corrective action." Thus the invocation of EPA's need to sometimes take such "swift action" is a judicial invention.

To the contrary, as in this case, EPA routinely issues Orders even when no immediate corrective action has been found to be necessary. In this case, EPA's various iterations of compliance orders were silent about any emergency.

Because EPA does not issue Orders in emergencies, the absence of a pre-deprivation hearing is a fatal constitutional flaw in the scheme on its face.

III.

A BALANCING OF PRIVATE AND GOVERNMENT INTERESTS REQUIRES A PRE-DEPRIVATION HEARING BEFORE A NEUTRAL DECISION-MAKER

If this case were treated as an as-applied challenge to the statute, the lower courts should

have engaged in a"balancing" of governmental and private interests.

Under *Mathews v. Eldridge,* 424 U.S. 319 (1976) three factors determine the contours of the pre-deprivation hearing that is required to satisfy due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

The *Mathews* factors, properly weighed, demonstrate that EPA must provide Recipients with a pre-deprivation hearing before a neutral decision-maker and with at least some customary procedures, such as the right to present evidence and cross-examine EPA witnesses.

a. The Private Interest

Recipients would incur substantial expenses, either in remediating the "wetlands violation," then applying for a wetlands permit and, if such a permit were denied, appealing the denial. The alternative would be to disobey the Order, and potentially incur ruinous fines and penalties, and legal fees in defending against EPA's enforcement action.

In the situation of private citizen-homeowners, the Order and the processes that follow, could either put the landowner in deep debt or require them to abandon their property. Individual owners and owners of smaller companies face personal ruin, because EPA can sue them individually as defendants.

"[T]he possible length of wrongful deprivation" also "is an important factor in assessing the impact of official action on the private interests." *Mathews,* 424 U.S. at 341. In cases such as this, the harm to a Recipient's property interests is magnified by the long delay before a Recipient can obtain any post-deprivation review of an Order.

b. The Government Interest

The second factor is the financial and operational cost of additional process and the need to conserve "scarce fiscal and administrative resources." *Mathews,* 424 U.S. at 347-348).

The only government interest weighing against a pre-deprivation hearing is that such a hearing would cost EPA money. "A prior hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. . . . [but] these rather ordinary costs cannot outweigh the constitutional right." *Fuentes,* 407 U.S. at 92 n.22; *INS v. Chadha,* 462 U.S. 919, 944 (1983). The governmental interest in not providing a pre-deprivation hearing based on marginal cost is minimal. This Court has properly recognized that where the government has no "special need for very prompt action" the mere cost or inconvenience to the government of providing review by a neutral is no basis for denying due process. *Fuentes,* 407 U.S. at 91

The court below held that Recipients have adequate opportunities to challenge an Order through a permit application process or an EPA enforcement action. Ironically, this holding shows

that providing Recipients with a pre-deprivation hearing is not too expensive or administratively inconvenient, because litigation in federal court is at least as expensive and time-consuming as a pre-deprivation hearing. A post-deprivation hearing before a neutral decision-maker and with procedural safeguards, similar to that provided under the Mine Act, as described in *Thunder Basin*, 510 U.S. at 206, would not impose any lesser costs or personnel burdens on the government than a pre-deprivation hearing because the scope of the substantive issues would be the same. The government cannot seriously plead additional financial or administrative burdens involving pre-deprivation hearings when it already claims to provide an immediate post-deprivation hearing. From an administrative standpoint it makes little difference whether that hearing is held before or after the seizure. *Connecticut v. Doehr,* 501 U.S. 1, 16 (1991). *See also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993).

CONCLUSION

Without effective judicial review, the Sacketts' due process rights are violated.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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Respectfully submitted,

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