No. 14-493

In the

Supreme Court of the United States

KENT RECYCLING SERVICES, LLC,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can affected parties challenge in federal court a final agency decision of a federal agency that significantly interferes with constitutionally protected liberties?

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus Center for Constitutional Jurisprudence[1] is a project of the Claremont Institute, a nonprofit organization whose mission is to restore and uphold the principles of the American Founding, including protecting the theory underlying our republic that we are endowed with inalienable rights and the function of government is to protect those rights. The Founding Generation saw the protection of individual rights in property as essential to the protection of all other individual rights. This principle is still true today and amicus seeks to protect that interest in this case.

In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance touching on individual rights in property, including *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S.Ct. 1367 (2012); and *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010).

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[1] Pursuant to this Court's Rule 37.2, all parties have granted consent for this brief. Petitioner filed a blanket consent with the clerk and the letter from respondent granting consent has been lodged with the clerk. Amicus gave notice to all parties of this brief more than 10 days prior to filing.

Pursuant to Rule 37.6, Amicus Curiae affirm 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 its preparation or submission.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. On behalf of the small business community, NFIB Legal Center filed in *Sackett v. EPA*, *supra*. Since this case raises a similar issue, the NFIB Legal Center seeks to file here as well because it is imperative that small business owners be given an opportunity to contest an assertion of Clean Water Act jurisdiction. Small business property owners—especially those of modest means—cannot afford to spend thousands of dollars pursuing a permit in order to ripen a challenge to an assertion

of jurisdiction. And small business owners cannot risk a financially ruinous enforcement action in order to ripen such a claim either. Accordingly, small business owners wishing to contest a definitive assertion of jurisdiction have a compelling and immediate interest in having their claim heard in court without spinning further around the procedural merry-go-round.

SUMMARY OF ARGUMENT

The court below correctly ruled that the Army Corps of Engineers Jurisdictional Determination was a "final decision. The court then ruled, however, that the Jurisdictional Determination had no impact on the property owner. This ruling conflicts with the rulings of this Court and represents a serious misunderstanding of the fundamental individual rights in property protected by the Constitution.

Individual rights in property pre-exist the Constitution and Congress recognized these rights in the first "bill of rights." The founding generation recognized protection of rights in property as the purpose of government. This Court has consistently recognized individual rights in property as fundamental.

The right protected is not simply ownership of property. Instead, the Constitution protects the owner's right to use and develop the property. While use can be regulated, the power of regulation is generally vested in state government, and that regulation is limited. Here, however, the Army Corps of Engineers is usurping this state regulatory power and imposing tremendous burdens on the property owner.

The Jurisdictional Determination issued by the Army Corps of Engineers operates much like the state statute at issue before this Court in *Susan B. Anthony*

List v. Driehaus, 134 S.Ct. 2334 (2014). The owner has a choice of foregoing all of his rights in the property or incurring significant costs in administrative hearings and substantial risks of criminal prosecution. The final decision asserting jurisdiction over the petitioner's property meets all of the requirements for ripeness.

ARGUMENT

I. The Jurisdictional Determination Affects Core Constitutional Liberties.

The 1787 Constitution made no explicit mention of individual rights in property and it was not an issue during the debates over ratification. This is not surprising. Regulation of property is an area of "traditional state authority." *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (plurality). Even in an era of minimal state regulation, there was little reason for the Founders to suspect that a federal agency would one day seek "to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board." *Id.*

Although the founding generation did not expect this vast increase in federal power, they were sensitive to potential violations of individual rights in property by territorial governments. In perhaps the first analog of a "bill of rights," the Northwest Ordinance of 1787 expressly protected property from government confiscation. Robert Rutland, THE BIRTH OF THE BILL OF RIGHTS (Northeastern Univ. Press 1991) at 102. The drafters of the individual rights provisions of the Northwest Ordinance took their cue from the 1780

Massachusetts Constitution. *Id.*, at 104. Although there was little mention of a fear of federal confiscation of property during the ratification debates, Madison included this protection in the proposed Bill of Rights, based on the protections included in the Northwest Ordinance. *See* THE BILL OF RIGHTS, ORIGINAL MEANING AND CURRENT UNDERSTANDING, (Eugene W. Hitchcock, ed.) (Univ. Press of Virginia 1991) at 233.

Madison may have used the language of the Massachusetts Constitution in crafting protections for individual rights in property. Those protections, however, were also firmly grounded in the Founder's theory of individual liberty and government's obligation to protect that liberty. This is the theory of government that animates our Constitution.

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. 1 Stat. 1 (Declaration of Independence ¶2). The Fifth Amendment seeks to capture a part of this principle in its announcement that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

Of course, the importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the

land." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND Bk. 1, Ch. 1 at 135 (Univ. of Chicago Press 1979) (1765). From the pronouncement that "a man's house is his castle" (Sir Edward Coke, THIRD INSTITUTE OF THE LAWS OF ENGLAND at 162 (1644) (William S. Hein Co. 1986)) to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King (*Miller v. United States*, 357 U.S. 301, 307 (1958)), the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion … over external things of the world, in total exclusion of the right of any other person in the universe." Blackstone, COMMENTARIES, *supra*, Bk. 2, Ch. 1 at 2. The individual rights in private property are part of the common law heritage that the founding generation brought with them to America.

The founding generation also relied on the writings of John Locke, who noted that private property was natural, inseparable from liberty in general, and actually preceded the state's political authority. John Locke, SECOND TREATISE OF GOVERNMENT, (Indianapolis: Hackett Publishing Company, 1980) 111; James W. Ely, Jr., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 17 (Oxford Univ. Press, 2nd Ed. 1998). Locke argued that government was formed to protect "life, liberty, and estates" and Thomas Jefferson merely substituted 'estates' with 'pursuit of happiness' in the Declaration. Willi Paul Adams, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 193 (Univ. North Carolina Press 1980).

Alexander Hamilton, building on these concepts, noted the central role of property rights in the protection of all of our liberties. If property rights are eliminated, he argued, the people are stripped of their "security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, in 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). This idea was also endorsed by John Adams: "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851). Our nation's Founders believed that all which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS CONSTITUTION (Philip B Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597.

This Court has recognized the fundamental nature of these property rights. Justice Washington noted that rights that are "fundamental" are those that belong "to the citizens of all free governments." *Corfield v. Coryell*, 6 F. Cas. 546, 551 (CCED PA 1823). He listed individual rights in property as one of the primary categories of fundamental rights. *Id.* This Court has followed Justice Washington's view, noting that constitutionally protected rights in property cannot be viewed as a "poor relation" with other rights secured by the Bill of Rights. *Dolan v. City of*

Tigard, 512 U.S. 374, 392 (1994); *see Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) (citing to Locke, Blackstone, and John Adams, the Court noted that "rights in property are basic civil rights.")

Individual rights in private property are foremost among those individual rights "which have at all times been enjoyed by citizens of the several States." *Slaughter-House Cases*, 83 U.S. 36, 74 (1872).

According to this Court, the stress here is on individual rights. "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." *Lynch*, 405 U.S., at 552. In *Lynch*, this Court noted the long recognition of these rights as "basic civil rights" from the writings of Locke through the adoption of the Fourteenth Amendment and the Civil Rights Acts. *Id*.

The fundamental nature of individual rights in property has been noted in other cases as well. When this Court has wanted to express the fundamental nature of a civil right under the Fourteenth Amendment it has used rights in property as an example. In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), for example, this Court noted the rights to "life, liberty, *and property*" were among the rights so fundamental that they "may not be submitted to a vote." *Id*. at 638; *see*, *e.g.*, *Palmer v. Thompson*, 403 U.S. 217, 234-35 (1971); *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736 (1964).

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." *Bartemeyer v.*

State of Iowa, 85 U.S. 129 (1873). These rights are the "essence of constitutional liberty." *Johnson v. United States*, 333 U.S. 10, 17 n.8 (1948). In a word, they are "fundamental." *In re Kemmler*, 136 U.S. 436, 448 (1890).

The individual right in property is not in mere ownership. Instead, this Court has noted that the right in property is the right to use that property. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987); *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). Thus, a Jurisdictional Determination that leaves a property owner the choice of leaving his property unused, incurring massive expense and delay of administrative proceedings, or risking criminal prosecution has a real and immediate impact. A challenge to the final decision of the Army Corps of Engineers that the property contains wetlands is therefore justiciable.

II. The Jurisdictional Determination Is a Final Decision that Is Justiciable.

A. The decision has immediate and concrete impact on the property owner.

The court below ruled that the property owner could not file a legal challenge to the Jurisdictional Determination because it "was not an action … from which legal consequences will flow." Slip Op. at 16. This conflicts with the ruling of this Court in *Rapanos*. First, the Jurisdictional Determination permits the Army Corps of Engineers to trench on an area of traditional state regulation. *Rapanos*, 547 U.S., at 738 (plurality). Absent a "clear and manifest statement"

of Congress, this Court has been unwilling to permit the Corps to exercise jurisdiction in this manner. *Id.*

Second, this Court has noted the tremendous regulatory burden that is consequent to a Jurisdictional Determination. Although a property owner has the opportunity to apply for a permit, the Corps "exercises the discretion of an enlightened despot" in deciding whether to grant the permit. *Id.*, at 721. The permit process itself is quite expensive and involves more than two years of proceedings before the agency. *Id.*

Third, the property owner cannot simply decide to forego the permit and develop his property. The Clean Water Act imposes both civil and criminal penalties. Even negligent violations of the Act can be punished with up to two years imprisonment. *Hanousek v. United States*, 528 U.S. 1102 (2000) (Thomas, J., dissenting). With a Jurisdictional Determination in place, however, the Corps is able to argue that any violation is instead a "knowing" violation of the Act. This converts the violation to a felony punishable by significant fines and imprisonment of up to six years. *Id.*; *Rapanos*, 547 U.S., at 721 (plurality); 33 U.S.C. § 1319(c)(2). The court below failed to credit these significant legal consequences.

B. Recent decisions of this Court acknowledge that constitutional claims on less certain injuries are justiciable.

Last term, this Court affirmed that the federal courts have an obligation to hear and decide cases in their jurisdiction which "'is virtually unflagging.'" *Susan B. Anthony List*, 134 S.Ct, at 2347 (*quoting*

Lexmark International, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1386 (2014)); *see also Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (federal courts have no right to "decline jurisdiction where jurisdiction is given"). The lower court's ruling shielding the Army Corps' final decision usurping traditional state powers from review conflicts with this unflagging obligation. Review by this Court is necessary to resolve the conflict.

The Jurisdictional Determination had two immediate constitutional implications. First, it usurped the state's traditional regulatory authority over property development. Second, it significantly interfered with the individual rights in property protected by the Constitution. The final decision usurping the state's regulatory authority left the property owner in this case with three choices. The owner could forego his constitutional property rights; he could submit himself to the more than two-year administrative process where the Corps reigns as an "enlightened despot"; or he could risk felony criminal charges for a "knowing" violation of the Clean Water Act.

The Jurisdictional Determination here is in effect a threat of imminent felony prosecution for any attempt to use the property (that is, to exercise constitutionally protected property rights). *See Rapanos*, 547 U.S., at 721 (plurality). This is one area where prosecutorial discretion cannot be trusted to avoid unjust charging decisions. *See Hanousek*, 528 U.S., at 1102 (Thomas, J., dissenting) (foreman prosecuted and sentenced to six months in prison for negligent violation of Clean Water Act involving accident by work crew that occurred while foreman was off duty and at home); *United States v. Mills*, 817 F.Supp.

1546, 1548 (N.D. Fla. 1993) (property owner convicted for violation of Clean Water Act and sentenced to nearly two years in prison for depositing dry sand on land that was probably never a wetland). The property owner need not wait until Army Corps files a felony indictment before bringing a challenge. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). The property owner in this case should not have to risk criminal prosecution to challenge the Jurisdictional Determination.

The harm imposed by the Jurisdictional Determination is not limited to the cost of administrative proceedings or the threat of criminal prosecution if the owner moves ahead with development plans. There is also harm if the Army Corps' action forces property owners to give up their individual rights in property to use their property. *Cf. Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (constitutional harm if statute results in "self-censorship"); *see* Damian M. Schiff and Luke A Wake, *Levelling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 113 (2013).

Definite legal and practical consequences flow from the Jurisdictional Determination issued in this case. The challenge to the final decision of the Army Corps of Engineers to assert jurisdiction over this land is justiciable. The case is within the jurisdiction of the federal courts and they have an obligation to exercise that jurisdiction. *Susan B. Anthony List*, 134 S.Ct., at 2347

CONCLUSION

Amici urge this Court to grant the petition for writ of certiorari to allow property owners to challenge the Army Corps of Engineers final decision that the property contained "jurisdictional wetlands." That decision of the Corps has real world consequences forcing the owner into expensive, years-long administrative proceedings. The only alternative for the property owner is to either abandon his constitutional rights or risk felony prosecution. By any measure, these real world consequences of the Corps' final decision make the challenge justiciable.

DATED: December, 2014.

Respectfully submitted,

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