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 A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF SENATOR DAVID VITTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae[1] is David Vitter, a U.S. Senator from Louisiana. As a member of Congress, Senator Vitter has a strong interest in seeing that federal statutes are properly interpreted and implemented. As the Ranking Member of the Senate Environment and Public Works Committee, Senator Vitter specifically has an interest in the application of the Clean Water Act. Senator Vitter further has an interest on behalf of his constituents to ensure that those affected by Clean Water Act "jurisdictional determinations" have the opportunity to seek immediate judicial review, without incurring severe costs or delays.

INTRODUCTION

This case relates to a challenge to a jurisdictional determination issued under the Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("CWA"). Petitioner Kent Recycling Services, LLC has the option to purchase certain property in Louisiana in the event that the property could be used as a solid-waste landfill. Pet. App. A2. In 2012, the United States Army Corps of Engineers

[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Pursuant to Supreme Court Rule 37.2, counsel of record for Respondent received notice of *amicus*'s intent to file this brief at least 10 days prior to the due date for *amicus curiae* briefs and granted consent. Petitioner filed blanket consent to the filing of *amicus curiae* briefs.

("the Corps") issued a jurisdictional determination delineating the property as wetlands subject to regulation under the CWA. As such, Petitioner was prohibited from discharging dredge or fill materials onto the land without first obtaining a permit under Section 404 of the CWA.

Petitioner commenced this litigation in the district court seeking to set aside the Corps' jurisdictional determination. The district court dismissed Petitioner's claims for lack of subject matter jurisdiction, ruling that the Corps' jurisdictional determination was not a "final agency action" subject to the court's review under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"). Pet. App. C-8.

On appeal, the Fifth Circuit affirmed. The court first held that the jurisdictional determination was not reviewable final agency action under the APA. Pet. App. at A-19. The court concluded that the jurisdictional determination marked the consummation of the Corps' decisionmaking process, *id.* at A-10, but that it was not an action "by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at A-19 (citing *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). The court next determined that the APA did not provide for a waiver of sovereign immunity with respect to Petitioner's claim that the Corps' administrative appeal process had deprived it of its liberty and property interests without due process of law. *Id.* at A-23.

As discussed below, this Court should grant review. The question presented is of vital importance to numerous landowners across the nation, including many Louisianans, whose property is potentially subject to a CWA jurisdictional determination. Left in place, the Fifth Circuit's decision will sanction a disturbing trend in which landowners are effectively deprived of the right to use and enjoy their private property without the ability to immediately challenge the deprivation in a court of law. Such an outcome is troubling and inconsistent with fundamental principles of due process and fairness.

SUMMARY OF THE ARGUMENT

1. This Court should grant review in this case to resolve an issue of great importance. The Fifth Circuit's decision will affect the property rights of ordinary Americans, including homeowners, farmers, and small businesses. As Justice Alito cautioned in his concurrence in this Court's decision in *Sackett v. EPA*, the inability to review jurisdictional determinations in court will "put the property rights" of these landowners "entirely at the mercy of Environmental Protection Agency (EPA) employees." 132 S. Ct. 1367, 1375 (2012). Property owners who wish to develop their property will be placed in the untenable position of proceeding with development and risking steep civil and criminal penalties, engaging in an expensive and time-consuming federal permit process, or abandoning their use of the property altogether. Under the

Fifth Circuit's decision, these owners are "blocked from access to the courts" unless they obtain a costly and unnecessary permit or they act without a permit and the EPA sues them. *Id.* As Justice Alito concluded: "In a nation that values due process, not to mention private property, such treatment is unthinkable." *Id.*

2. The Fifth Circuit's ruling disproportionally impacts the property rights of the residents of Louisiana. More than forty percent of the continental United States' wetlands are found in Louisiana, and it is therefore likely that property within Louisiana will be declared as wetlands at a much higher rate than elsewhere in the country.

If Louisiana's residents cannot challenge jurisdictional determinations in court, they face especially severe consequences. In many parts of Louisiana, the Corps employs the Modified Charleston Method to help offset development on wetlands. Under this method, the Corps may require mitigation of up to three acres of wetlands for every acre developed. This change from a one to one ratio of mitigation dramatically increases the costs of development. Since its implementation, the use of the method has negatively impacted Louisiana's economy and led to the abandonment of projects. The Modified Charleston Method also incentivizes the transformation of agricultural land to wetlands to offset development. Accordingly, land is being diverted from agricultural use and impacting the agricultural industry – an industry critical to Louisiana's economy. If jurisdictional determinations cannot be challenged in court, the

impact of the use of the Modified Charleston Method will increase. By the time the jurisdictional determination can be challenged, the damage caused by the use of this method will have already been done.

Louisiana is on the verge of significant economic expansion post-Hurricane Katrina. If the Fifth Circuit's decision is allowed to stand, this progress will be jeopardized. As was seen after the implementation of the Modified Charleston Method, development will decrease and businesses will abandon projects. Rather than flourishing as expected, Louisiana's economy will be put at risk.

ARGUMENT

I. THE INABILITY TO SEEK IMMEDIATE JUDICIAL REVIEW OF AFFIRMATIVE JURISDICTIONAL DETERMINATIONS UNDER THE CLEAN WATER ACT IMPACTS THE RIGHTS OF ORDINARY AMERICANS

The inability to challenge a jurisdictional determination jeopardizes the property rights of ordinary Americans, including the residents of Louisiana. In *Sackett v. EPA*, Justice Alito cautioned that property owners could face situations similar to that occurring here. In that case, the homeowners filled in part of their property in preparation for constructing a house. 132 S. Ct. at 1370. The homeowners subsequently received a compliance order from the EPA finding that their actions violated the CWA and

requesting them to restore their property to its original state. *Id.* at 1370-71. As part of the compliance order, the EPA concluded that part of the property contained wetlands. *Id.* at 1370. The homeowners challenged this jurisdictional determination by filing suit in district court. *Id.* at 1371. As in the present case, the district court dismissed the claims for lack of subject matter jurisdiction and the Ninth Circuit Court of Appeals affirmed. *Id.* This Court reversed and held that the compliance order is final agency action and can therefore be challenged in court. *Id.* at 1374.

In his concurrence, Justice Alito warned that the government's position "put the property rights of ordinary Americans entirely at the mercy of Environmental Protection Agency (EPA) employees." *Id.* at 1375. Justice Alito then explained the predicament faced by those like Petitioner and others who wish to develop private property but must weigh the severe consequences of proceeding without the blessing of EPA or the Corps. He observed:

> [I]f property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy. The EPA may issue a compliance order demanding that the owners cease construction, engage in expensive remedial measures, and abandon any use of the property. If the owners do not do the EPA's bidding, they may be fined up to $75,000 per day ($37,500 for violating the Act and another $37,500 for violating the

> compliance order). And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue. By that time, the potential fines may easily have reached the millions. In a nation that values due process, not to mention private property, such treatment is unthinkable.

Id.

As Justice Alito recognized, it is not only large commercial enterprises that are impacted by jurisdictional determinations. Small businesses, farmers, municipalities, individual homeowners, and other property owners are at risk of having their land erroneously declared as wetlands. In contrast to the Fifth Circuit's conclusion that the jurisdictional determination "does not oblige [a property owner] to do or refrain from doing anything to its property," Pet. App. at A-13, the determination places property owners at the EPA's mercy. Property owners – particularly homeowners, small businesses, and farmers – should not be required to face the impossible decision of refraining from developing their property, taking action and risking serious penalties, or undergoing an expensive and time-consuming permit process. Such choices are inherently unfair and contrary to the country's valuation of property rights.

II. LOUISIANA RESIDENTS WILL BE DISPROPORTIONALLY IMPACTED BY THE INABILITY TO CHALLENGE JURISDICTIONAL DETERMINATIONS

"Louisiana has over 40% of the coastal wetlands in the lower 48 United States." *Southeast Region*, U.S. FISH & WILDLIFE SERVICE, GEOGRAPHIC INFORMATION SYSTEMS, http://www.fws.gov/southeast/gis/ (last visited November 25, 2014). Due to this geography, Louisiana and its residents are highly likely to be impacted by law surrounding the delineation of property as wetlands. Given federal agencies' past practice of interpreting the phrase "the waters of the United States" broadly, *see, e.g., Sackett*, 132 S. Ct. at 1375 ("The reach of the Clean Water Act is notoriously unclear. Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the Act.") (Alito, J., concurring), it is possible that the Corps will not only designate actual wetlands as such, but will expand its authority over property that does not meet the criteria of "wetlands."[2] While the preservation of wetlands

[2] This is particularly concerning in light of EPA and the Corps' proposed rule to expand the definition of "waters of the United States." Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188 (proposed Apr. 21, 2014). Many – including *amicus* – see the rule as an inappropriate effort to expand EPA and the Corps' authority. If the rule is finalized, it is expected that the number of jurisdictional determinations of wetlands, particularly in Louisiana, will increase dramatically.

is important to Louisiana, erroneous jurisdictional determinations do not achieve this goal. Instead, Louisiana's small business owners, farmers, and homeowners will suffer the consequences of these determinations, without any corresponding benefit to the environment. This will have a disastrous impact on the economy of Louisiana and the property rights of its citizens.

In addition to the consequences that all property owners face if their property is erroneously declared as wetlands, Louisiana residents face unique challenges. In order to preserve the country's wetlands while supporting economic development, property owners are required to "offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Department of the Army] permits." *See, e.g.*, 33 C.F.R. § 332.3(a)(1); *see also id.* at § 332.2. "Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation." *Id.* at § 332.3(a)(2). The goal of compensatory mitigation is for there to be "no net loss of wetlands." United States Environmental Protection Agency & US Army Corps of Engineers, *Wetlands Compensatory Mitigation Rule*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY: WATER HOME, http://water.epa.gov/lawsregs/guidance/wetlands/upload/MitigationRule.pdf (last visited November 25, 2014). For example, when development on a property will impact wetlands, compensatory mitigation might involve "the restoration of former (historically

degraded) wetlands to mitigate the effects of wetland loss." *Id.* The Corps specifies exactly how the credits are calculated. 33 C.F.R. § 332.3(a)(1).

In many parts of Louisiana, the Corps utilizes what is known as the Modified Charleston Method to calculate the credits. Press Release, U.S. Army Corps of Engineers, *New Orleans District to use new model when evaluating applications* (Jan. 31, 2011), *available at* http://www.mvn.usace.army.mil/Media/NewsReleases/tabid/9286/Article/474127/new-orleans-district-to-use-new-model-when-evaluating-permit-applications.aspx. The Modified Charleston Method presents landowners with particular challenges that will exacerbate costs associated with a lack of judicial review for jurisdictional determinations.

First, the Modified Charleston Method dramatically increases mitigation costs – in some instances quadrupling the cost of the property to the owner. Christine Harvey, *Wetlands mitigation rules get tougher, and St. Tammany officials get worried*, THE TIMES-PICAYUNE, Mar. 4, 2012, http://www.nola.com/environment/index.ssf/2012/03/wetlands_mitigation_rules_get.html. Under this method, the Corps may require property owners to mitigate three acres of land for every acre of wetlands subject to development. *Id.* These increased costs have already curbed development and forced businesses to abandon projects. *See, e.g., EPW Committee Field Briefing Taken at the Louisiana Supreme Court*, 113th Cong. 28-29 (2014) (statement of Steven Serio, Attorney and Member of the International Council of Shopping

Centers). Such consequences "will likely become the norm for future projects throughout the region." *Id.* at 29.

Second, the use of the Modified Charleston Method has adversely impacted agricultural land. Agriculture is "the largest sector of [Louisiana's] economy" and is "currently valued at over $12 billion" and is "10 percent of [Louisiana's] workforce." *EPW Committee Field Briefing Taken at the Louisiana Supreme Court*, 113th Cong. 19 (2014) (statement of Dr. Mike Strain, Commissioner of the Louisiana Department of Agriculture and Forestry). As "one of the fastest growing sectors," agriculture is critical to Louisiana's economy. *Id.* Yet, the use of the Modified Charleston Method is chipping away at the land available for agriculture. Agricultural land has a high "average credit per acre" score under the method and developers are therefore incentivized to transform agricultural lands to wetlands. Letter from Members of Congress to Col. Richard Hansen, District Commander and District Engineer, U.S. Army Corps of Engineers – CEMVN (Sept. 22, 2014), *available at* http://repbillcassidy.files.wordpress.com/2014/09/la-delegation-letter-to-hansen-on-mcm-issues-9-24-14.pdf. This "unsustainable and unnecessary trend has resulted in significant, negative impacts to Louisiana's agricultural production and is posing a serious threat to farmers, consumers, and [Louisiana's] economy." *Id.*

If the Corps is permitted to designate property as wetlands without affording landowners the ability to challenge this determination, the problems due to the

use of the Modified Charleston Method will only increase. Even if they disagree with the decision, property owners will need to undergo the federal permit process and obtain mitigation credits in order to proceed with their project. Even if the determination that a property is a wetland is ultimately reversed, the damage has already been done: The property owner has needlessly spent money on mitigation (in addition to the cost of obtaining the permit) and the agriculture land has been converted to wetlands and is no longer available for farming.

The inability to seek immediate judicial review of jurisdictional determinations is even more troubling in light of Louisiana's present economic situation. Louisiana is experiencing renewed economic development post-Hurricane Katrina. Mark Waller, *Economics panelists compare post-Katrina New Orleans and Europe*, THE TIMES-PICAYUNE, Oct. 21, 2013, http://www.nola.com/business/index.ssf/2013/10/economics_panelists_compare_po.html. It is "on the verge of a significant economic expansion." *EPW Committee Field Briefing Taken at the Louisiana Supreme Court*, 113th Cong. 3 (2014) (statement of Sen. David Vitter). The Fifth Circuit's decision to restrict the ability of property owners to challenge erroneous jurisdictional determinations is an obstacle to this development.

For example, after the Modified Charleston Method was introduced, economic development decreased. The use of the method "brought a devastating halt to many beneficial development projects all across Southeast Louisiana." Press Release, Rep.

Steve Scalise, Amendment prevents the Army Corps from enforcing a devastating environmental standard (July 11, 2014), *available at* http://scalise.house.gov/press-release/scalise-amendment-passes-house. Fewer companies applied for construction permits, as the cost of mitigation rose. *The Modified Charleston Method: Introductory Analysis*, GREATER NEW ORLEANS INC. 8 (June 7, 2012), http://gnoinc.org/wp-content/uploads/Modified-Charleston-Method-Introductory-Analysis-FINAL-2012.06.07.pdf. As such, it is estimated that "future development – and jobs and tax revenue – will be threatened" by the Modified Charleston Method. *Id.* at 11.

A similar outcome can be expected as a result of the Fifth Circuit's decision. Without immediate judicial review of affirmative jurisdictional determinations, there is nothing to stop the Corps from leveraging the harsh realities of the Modified Charleston Method against landowners who simply wish to use and enjoy their private property. A proposed rule would further broaden the scope of the EPA and the Corps' authority over private property, enhancing the concerns presented in this case. *See* 79 Fed. Reg. 22188 (Apr. 21, 2014) (proposed rule seeking to expand the definition of "waters of the United States"). Businesses would opt not to take the risk of beginning to develop properties that may be subject to a costly permit process and mitigation. The inability to challenge jurisdictional determinations could have a chilling effect on needed economic development.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

December 1, 2014 Respectfully submitted,

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