No. 10-1062

In the

Supreme Court of the United States

CHANTELL SACKETT, et vir,

Petitioners,

v.

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 CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington, D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amici Curiae Center for Constitutional Jurisprudence and National Federation of Independent Business Small Business Legal Center

QUESTIONS PRESENTED

1. Does the Clean Water Act prohibit judicial review of orders issued by the Environmental Protection Agency prohibiting the use of private property, imposing significant costs on property owners, and threatening millions of dollars in civil penalties?

2. If review is prohibited, does that prohibition violate the Due Process Clause of the Fifth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. 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, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies—especially where that power interferes with the fundamental right to own and use property.

The National Federation of Independent Business (NFIB) is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici 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 Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

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 about 350,000 independent business owners who are located throughout the United States. The NFIB Small Business 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 NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses.

NFIB's membership includes ranchers, farmers, homebuilders and many others that would be adversely affected if judicial review were delayed until either the landowner has been denied a permit or is subject to an Environmental Protection Agency (EPA) enforcement action. As an organization that represents only the interests of small business owners, NFIB offers a unique perspective on the deleterious effects of the Ninth Circuit's ruling. Under this decision, landowners who have received a compliance order, that they believe is invalid, can get their day in court only by: (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Either choice is financially untenable for a small business owner and would adversely affect the business's ability to operate or expand.

SUMMARY OF ARGUMENT

Since this Court's decision in *Block v. Community Nutrition Institute*, 467 U.S. 340 (1980) the Circuit and District Courts have struggled with the implied preclusion doctrine. These courts have found preclusion based on analogy to statutes that are not analogous, vague clues in legislative history, and even on the simple absence of an express provision for review. Lost in these cases is the strong presumption of judicial review reflected in the Administrative Procedure Act and this Court's later decision in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). That strong presumption is not overcome by either the text or history of the Clean Water Act.

There is no evidence, convincing or otherwise, that Congress intended to permit EPA to issue unreviewable orders requiring property owners to vacate their property. Had Congress created such a scheme the protections of the Due Process Clause of the Fifth Amendment would require notice, a pre-deprivation hearing, and judicial review of any agency order.

ARGUMENT

I. THE CLEAN WATER ACT DOES NOT PRECLUDE JUDICIAL REVIEW OF EPA ORDERS

There is no doubt the Sacketts are the subject of a final agency action under the Clean Water Act. Their Administrative Compliance Order demands immediate and costly action on their part, failure of which can subject them to civil and administrative penalties over $1,000,000 per month. Judicial review

was given to the pharmaceutical companies in *Abbott Labs v. Gardner*, 387 U.S. 136 (1967), because "the impact of the regulations upon the petitioners is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at152.

The Sacketts have been ordered by the EPA to "immediately undertake activities to restore the Site," including the costly restoration of soil, plants and ongoing monitoring. The order ejects them from their property and prohibits them from using the land for any viable purpose. The order does not contemplate any further administrative proceedings. The Sacketts had no hearing prior to the imposition of the order and they have no opportunity for a hearing afterwards either.

Because the order is final and demands immediate compliance, the order meets all the requirements for finality set out in *Abbott*. *Id.* Although the Clean Water Act is silent on judicial review of such orders, the Administrative Procedure Act establishes the strong presumption in favor of review. Section 704 expressly provides for review of "final agency action for which there is no other adequate remedy in a court." EPA's argument that there is no judicial review of its order ejecting the Sacketts from their property is an "extreme" one that this Court should be "most reluctant to adopt 'without a showing of "clear and convincing evidence"' to overcome the 'strong presumption that Congress did not mean to prohibit all judicial review' of executive action." *Bowen*, 476 U.S. at 680-81.

A. Intent To Preclude Judicial Review Should Not Be Inferred Unless Review Would Interfere with Ongoing Administrative Proceedings

As this Court noted in *Block v. Community Nutrition Institute*, the presumption of review can be overcome if Congress clearly intended review by another method. This Court's main concern in *Block* was to prevent a party from bypassing the hearing process that was provided to them by Congress in the Act. *Block*, 467 U.S. at 348. If the consumers in *Block* were allowed to seek judicial review of pricing orders, then the producers, by joining suit with the consumers, would have a way to bypass the hearing process designed by Congress to allow the agency to handle the issue in the first instance. *Id.*

This Court revisited *Block* and implied preclusion two years later, addressing the statutory scheme of Medicare in *Bowen v. Michigan Academy of Family Physicians*. In *Bowen*, this Court reaffirmed the basic principle of 5 U.S.C. § 704 that judicial review is the default rule. *Bowen*, 476 U.S. at 674. That presumption of review cannot be overcome by "slender and indeterminate evidence of legislative intent." *Id.* Instead, there must be "clear and convincing evidence" that Congress intended to preclude judicial review. *Id.* at 681 (*quoting Abbott Labs v. Gardner*, 387 U.S. at 141). Thus, the mere fact that a law provides expressly for review in some instances and is silent in others is insufficient to overcome the presumption of judicial review. *Bowen*, 476 U.S. at 674.

The message of both *Block* and *Bowen* is that preclusion of review should not be lightly inferred.

Congressional intent to preclude review might be inferred from the fact that such review would otherwise interfere with an express statutory scheme for review. *Block*, 467 U.S. at 348; *Bowen*, 476 U.S. at 675-76. Absent such interference, however, the strong presumption of review should prevail. *Bowen*, 476 U.S. at 681. This is especially true where the underlying action violates constitutional rights. *Brown v. Plata*, __ U.S. __, 131 S.Ct. 1910, 1937 (2011). The Circuit and District Courts have lost sight of these principles and have rushed to apply *Block* to preclude judicial review where there is no congressional intent (convincing or otherwise) that supports preclusion. Indeed, in a search for this missing congressional intent, lower federal courts have relied on cases arising under different environmental laws that have review provisions different from that provided under the Clean Water Act.

B. Reliance on Cases Decided Under the Clean Air Act and CERCLA to Preclude Review of Orders Under the Clean Water Act is Erroneous

Lower courts have incorrectly relied on cases interpreting provisions of the Clean Air Act and Comprehensive Environmental Response Compensation and Liability Act (CERCLA) to preclude review of administrative compliance orders under the Clean Water Act. Those laws, however, have significantly different review provisions. They cannot be relied on to decide congressional intent regarding review under the Clean Water Act and they certainly cannot provide "clear and convincing evidence" of an intent to preclude review.

The Seventh Circuit was apparently the first Circuit Court of Appeals to consider the question of implied preclusion under the Clean Water Act. *See Hoffman Group v. EPA*, 902 F.2d 567, 569 (7th Cir. 1990). Finding no decisions under the Clean Water Act, the Seventh Circuit relied on cases decided under the Clean Air Act and CERCLA – but did so without reviewing the text or history of those laws. *Id*.

For instance, the *Hoffman* court relied on *Lloyd A. Fry Roofing Co. v. United States EPA*, 554 F.2d 885 (8th Cir. 1977), an Eighth Circuit opinion considering availability of review under the Clean Air Act. In that case, the Eighth Circuit relied on the fact that the Senate had originally proposed an express judicial review provision for compliance orders under the Clean Air Act but no such provision was attached to the version of the bill that cleared the Conference Committee. *Id*. at 890. Even if such a minor event in the convoluted history of legislation amounts to "clear and convincing evidence" of congressional intent to preclude review of orders issued pursuant to the *Clean Air Act*, that history says nothing about congressional intent underlying the *Clean Water Act*.

Further, unlike the Clean Water Act, the Clean Air Act does provide at least a hint of ongoing administrative proceedings. Under the Clean Air Act, compliance orders are not effective until the individual that is the subject of the order has an opportunity to first meet with EPA and discuss the terms and necessity of the order. 42 U.S.C. § 7413(a)(4) . That act also requires advance notice of the order. 42 U.S.C. §7413(a)(1). Thus, the Clean

Air Act has at least some indication of ongoing administrative proceeding. There is nothing similar or even analogous in the Clean Water Act.

The Seventh Circuit in *Hoffman* also relied on two cases decided under CERCLA: *Dickerson v. Administrator*, 834 F.2d 974 (11th Cir. 1987) and *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2nd Cir. 1986). Again, however, because the language of the statutes is different, CERCLA cases cannot be used to find congressional intent to preclude review of orders issued under the Clean Water Act. CERCLA contains an *express preclusion of judicial review*. *Dickerson*, 834 F.2d at 977-78. While this shows clear intent to preclude review under CERCLA, it indicates nothing about review under the Clean Water Act.

The Fourth Circuit followed the lead of the Seventh Circuit's *Hoffman* decision and ruled in *Southern Pines Associates v. United States*, 912 F.2d 713 (4th Cir. 1990), that there was no review of orders issued under the Clean Water Act. As did the Seventh Circuit, the Fourth Circuit relied on cases interpreting the Clean Air Act and CERCLA without noting how those laws differed from the Clean Water Act both in their text and their legislative history. *Id*. at 716.[2]

---

[2] The Ninth Circuit also relied on *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14 (1981), for the proposition that unless there was a strong indication of congressional intent to allow review, the court should conclude that Congress authorized the only remedy they thought appropriate. Of course, this has the analysis precisely backwards. *Sea Clammers* concerned whether there was a

C. Nothing in the Text or History of the Clean Water Act Shows an Intent to Preclude Judicial Review

The 1972 amendments to the Federal Water Pollution Control Act created the basis of the current Clean Water Act, and marked the birth of the Administrative Compliance Order. Under the Act, the Administrator can respond to a violation by issuing an order (as was done in this case), seeking an injunction from the District Court, referring the matter for criminal prosecution, or instituting administrative proceedings for imposition of a civil penalty. 33 U.S.C. § 1319. The only *express* provision for judicial review relates to the imposition of civil penalties in an administrative proceeding. 33 U.S.C. § 1319(g)(8). Judicial participation (not review) is required for an injunction, criminal penalties, or assessment of penalties for violation of an administrative compliance order. The Act is silent on the procedure for obtaining any type of review of the compliance order itself. The general presumption from this silence is that judicial review is available. *Bowen*, 476 U.S. at 681, 5 U.S.C. § 704.

The fact that Congress provided an express review provision for administrative penalties in the Clean Water Act and was silent on the availability of review for compliance orders does not guide the analysis. This Court in both *Abbott Labs* and *Bowen* rejected the idea that express review in one portion of a law and silence in another is sufficient to imply preclusion of judicial review. *Bowen*, 476 U.S. at

---

(continued) private right of action for money damages – not whether there was an implied preclusion of judicial review.

674; *Abbott Labs*, 387 U.S. at 141 ("The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent."). Thus, we must employ the analysis used in *Block* to determine whether the structure of the Act provides the "clear and convincing evidence" necessary to overcome the presumption of judicial review.

The primary concern in *Block* was that judicial review of the pricing orders by consumers had the potential to disrupt the "detailed mechanism" of administrative hearings meant to resolve disputes under that law. *Block*, 467 U.S. at 346-47. Contrary to the conclusions of lower federal courts, there is no similar "detailed mechanism" of review under the Clean Water Act.

First, the text of the Clean Water Act reveals no administrative mechanism for review. Orders are issued without hearing by the Administrator and are based on "any information," whatever its provenance or reliability. 33 U.S.C. § 1319(a). As already noted, the Act is completely silent on any review after the order is issued. Congress did not set out in the Clean Water Act the same "detailed mechanism" of administrative hearings that was at issue in *Block*. Once the Administrator issues an order, the administrative action is final.

EPA might argue that the fact that it amended the order in this case proves that "administrative proceedings" were ongoing. That argument misreads both the Court's decision in *Block* and the effect of amending the orders. *Block* was concerned with the administrative procedure established by Congress. *Block* , 467 U.S. at 346-47. By contrast, any

argument regarding the amendment of the orders in this case would simply establish that EPA can change its mind. This can have no legal effect, however. Otherwise, EPA would have to concede that it could never seek civil penalties for a violation of a compliance order since that order is always subject to change and the individual or company subject to the order cannot know when the order is actually "final." While EPA may be free to amend compliance orders, property owners like the Sacketts are required to adhere to those orders from the day they are issued. That is the process that Congress imposed in the Clean Water Act. Judicial review once the order is issued has no potential for interrupting any administrative process created by Congress.

Nor can the requirement of judicial involvement in the assessment of civil penalties be a basis for precluding judicial review of the order. Section 1319(d) merely provides that the Administrator can seek civil penalties in a judicial action for *violation* of the compliance order. Nothing in that section sets up a mechanism for actual review of the compliance order. The only issue before the court under section 1319(d) is the amount of the penalty. 33 U.S.C. § 1319(d). Again, there is nothing here at all similar to the administrative process that this Court sought to protect in *Block*. Simply stated, there is no ongoing administrative process that the court could interrupt.

Similarly, a silent congressional intent to preclude judicial review cannot be inferred by any need for EPA to take immediate action. Section 1319 specifically empowers the agency to seek an

injunction from a District Court in order to protect the environment. 33 U.S.C. §1319(a), (b). Applications for temporary restraining orders do not require any particular period of notice and many district courts even have procedures for presenting such an application outside of regular court hours. *See*, *e.g.*, Local Civil Rule 65.1, Rules of the United States District Court for the District of Columbia.

EPA may argue, of course, that such a procedure is inconvenient. The agency would be required to convince a neutral magistrate before it could eject a family from its property and impose significant costs on them. The agency would further be required to produce evidence of a violation and establish that the agency had jurisdiction over the property – all matters of dispute in the Sackett case. It would be much easier if EPA could issue its own injunctions without the need to prove its case to the court.

That is exactly how EPA is using the compliance order procedure. The compliance order acts as an injunction and carries the force of law. 33 U.S.C. § 1319; *see TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). Violation of the order is the basis for fines that can range as high as $1 million per month. 33 U.S.C. § 1319. If EPA can accomplish everything it wishes by administrative fiat without the need to prove its case to a court, why would it ever seek an injunction?

Allowing EPA to use the administrative compliance order in this manner – an injunction issued without hearing, without process, and protected from any judicial "interference," renders Congress' authorization for the Administrator to seek an injunction from the court as mere

surplusage. This Court has "cautioned against reading a text in a way that makes part of it redundant." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668 (2007). Yet if the Court were to interpret the Clean Water Act as precluding judicial review of orders, the provisions relating to injunctions become redundant and irrelevant. The fact that Congress did authorize the Administrator to seek an injunction is yet another piece of evidence arguing in favor of judicial review of the compliance order.

D. Intent To Preclude Judicial Review Should Not Be Inferred Where Constitutional Rights Are at Stake

In *Bowen* and again in *Webster v. Doe*, 486 U.S. 592 (1988), this Court has noted that where there is a colorable constitutional claim, any claimed intent on the part of Congress requires a "heightened showing." *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12. As detailed below, there are significant concerns that denial of judicial review of this order would violate the Due Process Clause of the Fifth Amendment. Indeed, the issuance of the order itself raises serious due process concerns.

The order issued to the Sacketts requires them to vacate their land and to restore it to a previous condition. Amici argue in the next section that such an order constitutes a deprivation of property. It is important to note that the Sacketts did not receive any type of predeprivation hearing before the EPA issued this extraordinary order expelling them from their land.

The requirements of due process are flexible and will require different procedures based on the interests of individual and those of the government. *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976). Nonetheless, some type of hearing is required before an individual is required to suffer the deprivation of right to property. *Id*. at 333-334. There is no occasion in this case to define precisely what type of hearing is required before the compliance order could issue against the Sacketts. What is clear, however, is that some sort of hearing is required and that absolutely no procedures were actually afforded. EPA, however, continues to argue that a deprivation of property without any hearing (pre or post-deprivation) is not subject to review by any court. The Court should not lightly assume that Congress intended to test the limits of its power under the Due Process Clause to authorize the taking of property without any type of hearing. *Webster*, 486 U.S. at 603; *Bowen*, 476 U.S. at 681 n.12. There is no clear indication of any such congressional intent and judicial review should not, therefore, be precluded by implication.

II. THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROTECTS INDIVIDUAL RIGHTS IN PROPERTY

It is no easy task for individual property owners to know whether their property is actually "the waters of the United States." EPA and the Corps of Engineers have yet to issue regulations defining their jurisdiction, leaving the question up to case-by-case administrative adjudication. Most property owners cannot survive in this regulatory environment

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process.

Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

The process is more burdensome for those who have no intent to fill the "waters of the United States" and indeed have no idea that their property may fall within the definition of "waters."

This Court's decision in *Rapanos* produced five separate opinions on what constitutes the "waters of the United States" for purposes of the Clean Water Act—none of which commanded a majority of the Court. The Chief Justice noted in his separate concurring opinion that the Court would grant substantial deference to EPA and the Army Corps of Engineers if they exercise their rulemaking power to issue regulations defining the terms at issue in the case. *Id.* at 758. In the nearly five years since the *Rapanos* decision was issued, the agencies have declined to issue such a regulation. Instead, they have chosen to issue a "guidance" which they emphasize is not a "regulation" and does not "impose legally binding requirements on EPA, the Corps, or

the regulated community, and may not apply to a particular situation depending on the circumstances." Joint EPA-Army Corps of Engineers Memorandum issued on December 2, 2008, entitled Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, at 4 n.17.

"Waters of the United States," it would seem, have now reached the status of Justice Stewart's definition of hard core pornography: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Justice Stewart and his colleagues were attempting to draw a line between what was protected by the First Amendment and what was not in the context of those who sought to push the boundaries of prior rulings. The Court was struggling to protect the liberties included in the Bill of Rights. Here, however, we are confronted with enforcement officials using their power under the law to compel surrender of private property rights on the basis of an "I know it when I see it" definition. The ambiguity in the definition increases the agency's power at the expense of individual liberty. The danger to those fundamental rights is only heightened by a refusal of the courts to review agency action.

The compliance order requirements displacing the Sacketts from their property distinguishes this case from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, this Court dismissed the argument that an agency's mere exercise of jurisdiction over property would constitute a taking. *Id.* at 127. Here, however, we have something more than a mere permit

requirement. The property owners have been ordered off of their property – all without any hearing and, according to EPA, without any right to judicial review.

In answer to the complaint that there has been no judicial review of this order to vacate their own property, the court below ruled that judicial review could be had if only the Sacketts would apply for a permit to fill the wetlands (whether or not the property is in fact wetlands) from the Army Corps of Engineers. Once that permit was denied, the Sacketts could then challenge the denial and thereby obtain judicial review of EPA's claim that the property at issue falls within the statutory definition of "waters of the United States."

The plurality opinion in *Rapanos* noted the difficulties in pursuing such a permit. On average, it takes a little more than two years to obtain a final decision from the agency and costs more than a quarter of a million dollars. *Rapanos*, 547 U.S. at 719. Even without the delay, the cost outstrips the total value of the vast majority of single family home lots.

The Ninth Circuit interpreted the statute as authorizing the agency to issue its own mandatory injunction (thus rendering meaningless the provisions of the statute authorizing the agency to seek an injunction from the United States District Court). A property owner who wants judicial review of that injunction has two options. First, the owner can ignore the order—daring the agency to bring the action to court in an attempt to enforce its injunction with civil penalties that can range up to $1 million per month. Then and only then will the property

owner have the opportunity to contest the basis of the order—that placing fill-dirt on the property amounted to the addition of a pollutant to the "waters of the United States." The statute provides that mere violation of the compliance order—separate and apart from violation of the Clean Water Act—is grounds for assessment of this crushing penalty. Thus, to obtain judicial review of the mandatory injunction a property owner would need to risk ruinous fines of potentially millions of dollars.[3]

The only other option is to submit to the injunction, vacate the property, and seek a permit from the Army Corps of Engineers. At the conclusion of that two-year process, the property owner could seek review of the agency's determination of whether the property constituted "waters of the United States." In this case, however, we deal with individuals who were seeking to build a home on a residential lot in an area where neighboring properties were already developed. This is not the type of a project that can support a permit process that costs a quarter of a million dollars and takes more than two years to complete. Nonetheless, the Ninth Circuit ruled that this was a sufficient opportunity for judicial review to avoid any violation of the Due Process Clause.

We arrive at this situation because of a steady devaluation of the constitutionally protected individual right to own and use property. Although

---

[3] If a property chose to ignore the compliance order for the time it took to obtain a final determination from the Army Corps of Engineers on a permit, the potential total fine would exceed $25 million.

specifically mentioned in the Takings Clause of the Fifth Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments, individual rights in property have steadily been eroded to the point that no constitutional violation is seen in regulations that require individuals to obtain "permission" to use their property. *Riverside Bayview*, 474 U.S. at 127. Indeed, a delayed hearing is not seen as a problem for purposes of the Due Process Clause where "*only* property rights are involved." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (emphasis added, citation omitted). Those conclusions are only possible if one ignores the original meaning of the protections in the Constitution for the individual right to own and use property.

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, BOSTON GAZETTE, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215 included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%

20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011). Article 39 of the Magna Carta provided, "No freeman shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited March 23, 2011). In his 1765 Commentaries on English Law William Blackstone expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "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* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of property rights. Ely, Lecture, *supra*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government*

380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, *supra*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life, liberty, and estates." Jefferson

substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and, in a word,

of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the 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). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "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).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores

the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, Lecture, *supra*, at 5.

The founding generation believed that all that 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* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, Lecture, *supra*, at 5.

These rights and values were enshrined in the Constitution—the Due Process Clause specifically forbids a deprivation of property without "due process of law." As a practical matter, however, the Ninth Circuit has authorized in this case what amounts to a permanent deprivation of property with no opportunity for judicial review. Review by this Court is necessary to preserve the Due Process protections for individual rights in property.

CONCLUSION

For more than two centuries, it has been an undoubted premise of our constitutional government that review by the judiciary is available to check actions of the executive that violate either congressional enactment or a provision of the Constitution. This Court has previously quoted Chief Justice Marshall on this precise point:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process ... leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

United States v. Nourse, 34 U.S. (9 Pet.) 8, 28-29 (1835) (*quoted in Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995).

EPA seeks to overturn this bedrock principle of our liberty. Amici urge this Court to reverse the decision below and to find that there is no implied preclusion of judicial review of the EPA order.

DATED: September, 2011.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave., NE
Washington, D.C.
20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional
Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amici Curiae Center for Constitutional Jurisprudence and National Federation of Independent Business Small Business Legal Center

From:	Incoming Lit
To:	Kiren K. Prasad; Teresa E. Sotelo
Subject:	FW: USSC 10-1062 Chantell Sackett et vir v. Environmental Protection Agency et al. BRIEF OF AMICUS CURIAE OF THE CENTEER FOR CONSTITUTIONAL JURISPRUDENCE et al IN SUPPORT OF PETITIONERS
Date:	Friday, September 30, 2011 12:30:16 PM
Attachments:	ATT00001.htm Raymond Charles Clark.vcf ATT00002.htm 10-1062 tsac Center for Constitutional Jurisprudence et al..pdf ATT00003.htm

---

From: Damien M. Schiff
Sent: Friday, September 30, 2011 12:29:50 PM
To: Incoming Lit
Cc: Brandon M. Middleton
Subject: Fwd: USSC 10-1062 Chantell Sackett et vir v. Environmental Protection Agency et al. BRIEF OF AMICUS CURIAE OF THE CENTEER FOR CONSTITUTIONAL JURISPRUDENCE et al IN SUPPORT OF PETITIONERS
Auto forwarded by a Rule

D. Schiff

Begin forwarded message:

> **From:** "Raymond Charles Clark" <rcclark@byronadams.com>
> **To:** "Supreme Court of the United States" <meritsbriefs@supremecourt.gov>
> **Cc:** "SupremeCtBriefs@usdoj.gov" <SupremeCtBriefs@usdoj.gov>, "Damien M. Schiff" <dms@pacificlegal.org>
> **Subject: USSC 10-1062 Chantell Sackett et vir v. Environmental Protection Agency et al. BRIEF OF AMICUS CURIAE OF THE CENTEER FOR CONSTITUTIONAL JURISPRUDENCE et al IN SUPPORT OF PETITIONERS**
>
> USSC 10-1062 Chantell Sackett et vir v. Environmental Protection Agency et al.
>
> BRIEF OF AMICUS CURIAE OF THE CENTEER FOR CONSTITUTIONAL JURISPRUDENCE et al IN SUPPORT OF PETITIONERS
>
> Filed September 30, 2011 (9:12 AM)
>
> Donald Verrilli, Jr.
> Solicitor General of the United States
> United States Department of Justice
> 950 Pennsylvania Avenue, NW
> Washington, DC 20530-0001

SupremeCtBriefs@usdoj.gov<mailto:SupremeCtBriefs@usdoj.gov>

Damien M. Schiff
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
dms@pacificlegal.org<mailto:dms@pacificlegal.org>

[cid:image001.jpg@01CC7E90.472C2E90]