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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This case is especially important to the Chamber because of the Environmental Protection Agency's ("EPA's") longstanding pattern and practice of circumventing traditional enforcement mechanisms by issuing extraordinarily coercive administrative orders without due process of law. EPA's tactics are particularly remarkable in this case, which involves a couple's desire to build a home on their residential plot. But as thousands of businesses have learned the hard way, this is par for the course with EPA.

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[1] The parties have consented to the filing of this brief in letters filed herewith. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Administrative law is full of flexible procedures that constitutionally balance the government's need for flexibility with private citizens' right to due process, including the right to a hearing before a neutral decisionmaker before or promptly after any deprivation occurs. EPA routinely uses none of those procedures. Instead, it issues administrative orders that adjudicate liability, require costly actions, and impose severe penalties for non-compliance, without providing *any* due process rights at the administrative level. And if the recipient of such an order challenges it, EPA takes the position that the recipient is not entitled to any judicial review until EPA eventually files an action in court several years later, following the accrual of massive and highly coercive penalties. It is easy enough to understand the allure of such a unilateral regime to EPA, because the agency can impose its will without according even the most basic due process protection—the right to a timely hearing before a neutral decisionmaker. But that is exactly what makes this regime so unconstitutional.

I. This is a problem of staggering proportions. Unable to resist the temptation to bypass traditional remedies, EPA issues numerous unilateral orders every day, in routine, non-exigent circumstances. And it does so under a wide variety of environmental statutes for the very purpose of evading the need to prove its case before a neutral decisionmaker.

II. This practice leaves recipients with no realistic choice but to comply with its orders. Non-

compliance subjects a recipient to penalties up to *$37,500 per day*, approaching a total of *$70 million* if EPA waits five years to bring suit, as is its statutory right. No matter how wrong an administrative order may be, individuals, families, and small businesses simply cannot risk bankruptcy as the price of seeking judicial review.

Even large businesses that might be able to pay up to $70 million for a day in court cannot realistically risk the full consequences of non-compliance. An order immediately adjudicates the company legally culpable and recalcitrant if it opts not to comply. It reduces the company's stock value and credit rating, which increases the company's cost of capital. It constrains the company's ability to dispose of the relevant real property, and impairs the company's relationships with stakeholders and its ability to recruit employees.

Practical experience has therefore confirmed that even the most sophisticated parties choose to incur enormous compliance costs instead of run the risks of non-compliance. The very few individuals or companies that have refused to comply with EPA's orders so as to seek their day in court are the exceptions that prove the rule—those that could not afford to comply and therefore had to take their chances, or that perhaps miscalculated by pursuing a course no rational business could justify.

Denial of prompt judicial review of EPA's orders therefore violates due process. This Court has long held that deferral of judicial review is unconstitutional where, as here, it is accompanied by penalties "so enormous . . . as to intimidate" a party

from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. 123, 147 (1908). That is clearly the case here. Moreover, this Court has stressed that liens, attachments, and other similar encumbrances on property warrant immediate due process protection. EPA's administrative orders have the same effects as such encumbrances by impairing a recipient's use of the property, potentially destroying the property's value, and limiting its alienability.

III. Precisely because EPA's unilateral orders violate the most basic due process rights, they are an aberration in administrative law. Numerous administrative law schemes provide process before, or at least immediately after, an agency issues a similar order. Far from dismantling the administrative state, providing timely due process here would merely bring EPA's administrative-order schemes into line with the procedures applicable to numerous other agencies—agencies whose health-and-safety missions are no less important or pressing than EPA's.

ARGUMENT

I. EPA ROUTINELY CIRCUMVENTS TRADITIONAL DUE PROCESS PROTECTIONS BY ISSUING ADMINISTRATIVE ORDERS UNILATERALLY.

Unfortunately, EPA's use of administrative orders is not limited to the Sacketts. It is not even limited to the Clean Water Act ("CWA" or "Act"). EPA eschews traditional remedies and instead issues unilateral administrative orders under numerous environmental statutes. It does so as a matter of course—not only in emergency situations

where traditional due process protections might be viewed as impractical, but in routine cases where such protections are integral to our constitutional structure. And internal EPA documents show that EPA does so for the very purpose of coercing companies and individuals into surrendering their right to judicial review of EPA's unilateral actions.

The CWA gives EPA multiple options. Among other things, if "the Administrator finds that any person is in violation" of the Act, he or she may "bring a civil action" or "issue an order requiring [the violator] to comply." 33 U.S.C. § 1319(a)(3). EPA has similar alternatives under many other environmental statutes, such as the Clean Air Act, *see, e.g.*, 42 U.S.C. § 7413(a)(3)(B), (a)(3)(C); the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6934, 6973; and the Emergency Planning and Community Right-to-Know Act, *see* 42 U.S.C. § 11045(a).

The allure of acting unilaterally has been too strong for EPA to resist. In disputes arising under all of those statutes, EPA has repeatedly chosen to issue unilateral orders rather than prove its case before a neutral decisionmaker. *See, e.g.*, *Gen. Elec. Co. v. Jackson*, 610 F.3d 110, 113 (D.C. Cir. 2010); *TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003); *In re Duplan Corp.*, 212 F.3d 144, 155-56 (2d Cir. 2000). To some extent, that is to be expected absent judicial intervention—of course an agency would prefer to act unilaterally than to have to prove its case before a neutral decisionmaker. But the

sheer scope, and abusive nature, of EPA's efforts to bypass traditional remedies are startling.

As the Sacketts have explained, EPA's "accomplishments" include issuing up to 3,000 orders annually under the CWA—nearly 60 per week. Pet. 13-14 & n.11. As another example, EPA has formalized a CERCLA enforcement policy under which it "typically will compel private-party response through unilateral orders." EPA, OSWER Directive No. 9833.0-1a, Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, 3 (Mar. 7, 1990), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf (last visited Sept. 29, 2011).

Indeed, EPA no longer goes to court to seek clean-up orders under CERCLA. Instead, it has issued over 1,700 aptly named Unilateral Administrative Orders ("UAOs") to more than 5,400 companies—averaging "approximately six UAOs to nineteen [companies] every *month*." *Gen. Elec. Co. v. Jackson*, 595 F. Supp. 2d 8, 33 (D.D.C. 2009). When there is an actual emergency, EPA will not issue a unilateral order; instead, it will clean up a site and then seek compensation from responsible parties. *Id.* at 32. That makes the inversion of normal due process principles all the more remarkable—EPA circumvents traditional remedies in favor of unilateral orders only when there is no emergency, and thus no excuse for departing from traditional due process protections.

And EPA does so for the very purpose of coercing recipients into surrendering their due process rights.

In a recent lawsuit between the General Electric Company ("GE") and EPA over this issue, a district court allowed GE to take discovery. Internal documents that EPA was forced to produce reveal that EPA actually trains its personnel to make the terms of unilateral orders "ugly, onerous, and tough" and "very unpleasant," in order to coerce settlements. Pet. Br. 8, *Gen. Elec. Co. v. Jackson*, No. 10-871 (S. Ct. filed Dec. 29, 2010) (internal citations omitted). EPA's internal documents further confirm that EPA seeks to threaten recipients with games of "Russian Roulette," so as to further coerce their entry into "'voluntary' decrees." *Id.* (internal citations omitted).

EPA may well believe that its tactics are an appropriate and effective way of dealing with people and companies that *it* believes to have violated the law. But that is exactly why the Due Process Clause does not leave the choice to the agency. *See Fuentes v. Shevin*, 407 U.S. 67, 90 & n.22 (1972).

II. EPA'S RELIANCE ON UNILATERAL ORDERS VIOLATES DUE PROCESS.

EPA's issuance of unilateral orders without pre-issuance or even prompt post-issuance process is a violation of due process. The essence of due process is the right to notice and an opportunity to be heard by a neutral decisionmaker before, or at the very least immediately after, a deprivation. *See Fuentes*, 407 U.S. at 80, 90-91. The Ninth Circuit held that prompt process is unnecessary here because a recipient that declines to comply with an administrative order can receive judicial review years later, at a time of EPA's choosing, after

enormous statutory penalties have accrued. *See* Pet. App. A-14–A-15. That was wrong.

A. EPA's Administrative Orders Are So Highly Coercive That They Leave Recipients No Real Choice But To Comply.

EPA's administrative order scheme violates due process because the penalties for violation of an order are "so enormous . . . as to intimidate" recipients from "resorting to the courts to test [an order's] validity" before complying with it. *Ex Parte Young*, 209 U.S. at 147. If EPA continues to insist on issuing administrative orders without providing any pre-issuance opportunity for a hearing before a neutral decisionmaker, the courts must, at the very least, provide prompt, post-issuance process.

1. It bears emphasis that EPA's orders are orders, not merely complaints that initiate adjudicatory proceedings in which enforcement and process might later be had. The self-styled "COMPLIANCE ORDER" in this case, for example, states no fewer than 24 times that it is an "Order." Pet. App. G-1–G-7.

The order—which emphasizes that it is "effective on the date it is signed," reports EPA's "FINDINGS AND CONCLUSIONS," including findings and conclusions that the Sacketts' alleged discharges "constitute[] a violation of" the CWA. Pet. App. G-1, G-3. Based on those findings, the order states that the Sacketts are "hereby ORDERED" to, among other things, remove "all unauthorized fill material," provide photographic proof of compliance, and grant EPA access to the site and to all relevant documents. Pet. App. G-4–G-5, G-6. To top it all off, the order

threatens the Sacketts with civil penalties up to $32,500 per day, administrative penalties up to $11,000 per day, or injunctive relief if they do not comply with the order. Pet. App. G-7.

2. Under such orders, massive penalties accrue before any opportunity for a hearing before a neutral decisionmaker. EPA issues its orders without affording any process, such as a hearing before an Administrative Law Judge. And a party that does not immediately comply faces penalties of up to $37,500 *per day*, again before receiving any process. *See* 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4 (adjusting statutory penalty for inflation).

Penalties can approach $70 million when EPA waits the full five years to bring suit against the recipient. *See* 28 U.S.C. § 2462. And under some of these related statutory schemes, EPA may even seek punitive damages. *See* 42 U.S.C. § 9607(c)(3). This is, quite simply, regulation by sledgehammer.

The concrete consequences of EPA's routine issuance of thousands of such orders in non-emergency situations cannot be overstated. The threat of tens of millions of dollars in penalties is overwhelming to individuals, families, and small businesses with no capacity whatsoever to absorb such losses. Failing to comply would require them to risk everything as the price for exercising their constitutional right to judicial review. As a district court found in a related case, non-compliance can literally drive companies out of business, imposing the corporate equivalent of the death penalty. *See Gen. Elec.*, 595 F. Supp. 2d at 30. A family's solvency, and a company's existence, are surely

weightier due process interests than the toasters in their kitchens or lunch rooms, which cannot be reclaimed without far more timely process. *Cf. Fuentes*, 407 U.S. at 89-90.

Even for large companies that might otherwise be willing to risk severe monetary penalties in exchange for a day in court, administrative orders impose additional, immediate, and irreparable harms. In the CERCLA context, for example, a district court found that a company's failure to comply with an administrative order causes it to suffer market impacts on its stock price, brand value, and cost of financing. *See Gen. Elec.*, 595 F. Supp. 2d at 27, 30. Those impacts are significant—on average, compliance costs $3 million but non-compliance causes an immediate decrease in market value approaching $76 million, as well as a significant increase in financing costs. *See id.* at 30; *see also id.* at 22. Non-compliance has a further, real-world impact on a company's ability to hire and its relationships with stakeholders, as it is publicly branded as a recalcitrant actor. *See id.* at 22. Worse, those impacts can plague a company for years as the government rests on its laurels while waiting to sue—leaving the company with no hearing before a neutral decisionmaker until EPA chooses to bring suit many years later. *See* 28 U.S.C. § 2462.

The proof is in the pudding because even the most sophisticated litigants routinely spend enormous amounts of money to comply with unilateral orders rather than waiting to challenge them in courts. Experience amassed over the last three decades has shown that only about 3.5%

percent of all recipients of CERCLA administrative orders did not fully comply to EPA's satisfaction. *See Gen. Elec.*, 595 F. Supp. 2d at 28. Because most of those instances apparently involved attempted compliance rejected by EPA, only a bare handful have ever chosen to risk the consequences of non-compliance.

For that reason, courts have played little role in overseeing EPA's orders. Decisions articulating or applying the legal standards governing EPA's issuance of such orders and the imposition of penalties are relatively few and far between precisely because recipients cannot risk the consequences of non-compliance, and thus cannot exercise their constitutional right to judicial review.

The few individuals or companies that have elected to seek judicial review are isolated exceptions that prove the rule—they either lacked the resources to comply with an order and were therefore forced to take their chances, or perhaps miscalculated and served as a cautionary tale for others. For all but the truly desperate or reckless, non-compliance is only an illusory option, available in theory, but not a meaningful path to judicial review in practice. The "result is the same as if the law in terms prohibited the [party] from seeking judicial [review]" at all. *Ex Parte Young*, 209 U.S. at 147.

The costs of compliance underscore that reality. For example, recipients of CERCLA orders have spent billions of dollars in response costs over the past thirty years. *See* United States General Accounting Office, *Superfund Program Management*, GAO/HR-97-14 at 6 (Feb. 1997), *available at*

http://www.gao.gov/archive/1997/hr97014.pdf (last visited Sept. 29, 2011). The fact that all but a handful of the thousands of unilateral order recipients have chosen to pay those substantial costs of compliance instead of challenging EPA's orders in court is irrefutable evidence that the coercion is real.

3. In the end, therefore, the court of appeals erred by treating the *theoretical* possibility of judicial review as dispositive. *Ex Parte Young* explicitly called for courts to look not to possibilities in the abstract, but to concrete "result[s]." 209 U.S. at 147.

The Ninth Circuit overlooked the reality of the situation by stating that recipients could eventually challenge EPA's issuance of an order by not complying, waiting for EPA to eventually bring an enforcement action in court, and then putting EPA to the test. Pet. App. A-12, A-14–A-15. As the experience discussed above reflects, that "remedy" is inadequate for at least two reasons: it is untimely in light of the severe penalties and other consequences of non-compliance discussed above, and it is extremely uncertain. Whether a court will eventually decide that the recipient of a unilateral order actually violated the relevant environmental statute is difficult to predict. That is especially true in cases like this, where the definition of federal "wetlands" has proven to be difficult at best to determine. *See, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 721-22 (2006) (plurality op.); *see also id.* at 759 (Kennedy, J., concurring in the judgment).

Moreover, there is no statutory good-faith defense to penalties. Congress specified that every violator

"*shall* be subject to a civil penalty . . . ." 33 U.S.C. § 1319(d) (emphasis added). Nor does the courts' discretion over the *amount* of penalties ameliorate the problem. If anything, the courts' open-ended discretion to weigh numerous factors in assessing penalties only adds to their unpredictability: "In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require." *Id.*; *cf. Reisman v. Caplin*, 375 U.S. 440, 446-50 (1964) (contemplating less vague "good faith" defense). The resulting uncertainty makes the risk of seeking judicial review too great, even for those who are confident in their position.

The Ninth Circuit further erred by stating that "the CWA has a permitting provision" that allows administrative order recipients to request a permit and immediately appeal its denial. Pet. App. A-13 (citing 33 U.S.C. § 1344(a)). That puts the cart before the horse because EPA generally considers "[a]fter-the-fact permit applications" only "[f]ollowing the completion of any required initial corrective measures[.]" 33 C.F.R. § 326.3(e)(1). Immediate appealability of a permit denial is worthless if the permit application never advances beyond square one. And as the Sacketts explain, the permitting process "is ruinously expensive" in any event. Pet. Br. 30.

B. The Effect Of EPA's Orders Is Similar To Liens, Which Require Pre-issuance Process.

The due process violation is confirmed by the fact that EPA's orders have substantially the same effects as liens and other direct encumbrances on property rights—encumbrances that this Court has long recognized as meriting timely due process protection.

1. In *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988), for example, this Court held that "state procedures for creating and enforcing . . . liens are subject to the strictures of due process" where a lien's very issuance triggers "serious consequences." The Court explained that even when no execution sale of the property has yet occurred, the very filing of the lien creates "a cloud on [the party's] title," "encumber[s] the property and impair[s] [the party's] ability to mortgage or alienate it." *Id.* at 82, 85. That the "judgment against [the party] and the ensuing consequences occurred without notice . . . and . . . an opportunity to be heard" amounted to a due process violation. *Id.* at 86 (emphasis added); *see also Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 604 (1974); *Hodge v. Muscatine County*, 196 U.S. 276, 281 (1905).

In *Connecticut v. Doehr*, 501 U.S. 1 (1991), this Court extended that holding about liens to encompass all similar encumbrances on property: "temporary or partial impairments to property rights that attachments, liens, *and similar encumbrances* entail are sufficient to merit due process protection." *Id.* at 12 (emphasis added). Acknowledging that pre-judgment attachment did "not amount to a complete,

physical, or permanent deprivation of real property" and had an impact "less than the perhaps temporary total deprivation of household goods or wages," this Court nonetheless cautioned that due process protections are not confined to such "extreme" deprivations. *Id.*; *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-300 (1981) (immediate cessation order halting surface mining operations was cognizable deprivation of property); *Whitman*, 336 F.3d at 1258-59 (administrative compliance order was more than "merely a complaint-like instrument with no legal significance" and violated due process); *United States v. 408 Peyton Road SW*, 162 F.3d 644, 650-51 (11th Cir. 1998) (en banc) (arrest and seizure warrants for property, even absent physical seizure, were cognizable deprivations of property); *Reardon v. United States*, 947 F.2d 1509, 1523 (1st Cir. 1991) (en banc) (CERCLA lien, even absent a final liability determination, was cognizable due process deprivation).

The *Doehr* Court relied on the significant "consequences" of the challenged act: "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause." *Id.* at 11-12; *see also id.* at 27-28 (Rehnquist, J., concurring in part and concurring in the judgment) (quoting same language in agreeing that due process protections were triggered despite owner's "undisturbed possession" of property). For due process purposes,

therefore, the question is whether a challenged action has impacts sufficiently "similar" to those of liens or attachments. *See Reardon*, 947 F.2d at 1518 (CERCLA lien "amounts to deprivation of a 'significant property interest'" because it "has *substantially the same effect . . . as the attachment* had on the plaintiff in *Doehr*—clouding title, limiting alienability, affecting current and potential mortgages." (emphasis added)).

2. Like a lien or attachment, a unilateral order does not deprive the recipient of the physical use or possession of its property, but its impact on the affected property is nonetheless immediate and palpable: the order impairs the company's right to dispose of the property by limiting alienability. It deters potential buyers and mortgage lenders by leaving them uncertain as to the extent of the ultimate liability. Even beyond the specific property or operation implicated, the order reduces the company's stock value and credit rating. *See Gen. Elec.*, 595 F. Supp. 2d at 23, 28. Moreover, the imposition "may be in place for a considerable time without an opportunity for a hearing," since the statute of limitations throws the judicial determination "so far into the future as to render it inadequate." *Reardon*, 947 F.2d at 1519-20.

The order at issue here confirms that reality. It requires the Sacketts to make physical changes to their land that deprive it of any economic value, and to allow EPA officials to "access" their land and "move freely" about it. Pet. App. G-4–G-5. Underscoring the practical constraints on alienability, the order requires the Sacketts to provide an advance copy of its contents to any

potential purchaser before transferring any interest in the land. Pet. App. G-6.

The burdens imposed by such orders on ordinary property owners such as the Sacketts are plainly so draconian as to divest them of any quiet enjoyment of their property. The burdens on small and large businesses are just as onerous. In the modern economy, impairing businesses' capacity to enter into the financial markets and to secure equity and debt financing dramatically undercuts their provision of goods and services, hiring, and critical investments in business upgrades and research and development.

C. There Is No Justification For Deferring Review, Especially In Non-emergency Situations.

There is especially little justification for deferring due process so far down the road. The court of appeals held that the "goal of enabling swift corrective action would be defeated by permitting immediate judicial review of compliance orders." Pet. App. A-8. But that is simply another way of saying that coercing parties to comply is more efficient than providing them with timely process. As this Court has noted, "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 90 & n.22.

So long as review is eventually available, there is no justification for allowing EPA, in its sole discretion, to defer it for years, even in routine, non-emergency situations. The type of hearing would presumably be the same; only the timing would be

different. "From an administrative standpoint it makes little difference whether that hearing is held before or after the [deprivation]." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 59 (1993); *see also Doehr*, 501 U.S. at 16.

Thus, this Court has emphasized that deferral of process can be justified only by a need for very prompt action, and that the permissible *length* of the deferral is necessarily limited by that justification as well. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979); *see also N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975). There is no exigency in issuing an administrative order in the vast majority of cases, including this one. Indeed, in this very case, EPA has repeatedly issued amendments and extensions to the time limits in its orders, making clear that there is no exigency precluding timely due process. *See* Pet. App. H-1–H-3, I-1–I-3.

The only reason that postponing process could benefit the government is that administrative order recipients might avail themselves of timely process, but not of delayed and untimely process. That only underscores the coerciveness of this scheme, and the violation of basic due process rights. The fact that timely process would be useful to administrative order recipients is hardly a reason for denying it. Providing prompt, timely process not only permits private citizens to seek redress, it also deters government abuses from occurring in the first place.

III. THE UNILATERAL ORDER SCHEME IS AN ABERRATION AMONG ADMINISTRATIVE LAW STATUTES.

Precisely because it deviates from the fundamental due process principles discussed above, EPA's unilateral order scheme also departs from other administrative-law regimes. EPA's administrative orders are so coercive, and their consequences so dire, that one would expect *heightened* procedures to apply to their issuance. Yet EPA routinely issues them with significantly *less* process than other agencies use in circumstances implicating far less weighty private interests and far greater exigencies.

Other comparable regulatory schemes afford recipients of adjudicatory orders either a prior hearing before a neutral decisionmaker or a prompt opportunity for independent review after the order is issued. Holding EPA to that bedrock constitutional requirement would hardly bring the modern administrative state to its knees. Instead, it would bring EPA's aberrational scheme in line with the procedures already adhered to by many other agencies. *Cf. Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (abrogation of protections regularly afforded by other regulatory statutes "raises a presumption that its procedures violate the Due Process Clause").

1. Most administrative law statutes provide process *before* an agency issues an order or takes some other action. That is so even when the private interests are less weighty and there is a more pronounced governmental urgency than here. The

Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089, for example, requires the Consumer Product Safety Commission to file a district court action against an "imminently hazardous consumer product" and its manufacturer, distributor, or retailer, where the product presents an "imminent and unreasonable risk of death, serious illness, or severe personal injury." *Id.* § 2061(a). Notwithstanding the grave hazards posed by the product, Congress still requires the CPSC to bring an action in an Article III court before halting the manufacture or distribution of the product. *See id.* §§ 2061(a), (b).

In similar fashion, the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, requires the Secretary of Labor to petition a federal district court if it seeks to "restrain any conditions or practices in any place of employment." *Id.* § 662(a). Again, the statute requires such judicial process even where the underlying violations can reasonably be expected to "cause death or serious physical harm immediately." *Id.*

In regulatory schemes that do not involve a pronounced interest in speed, as here, prior process is even more common. For instance, under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58, the Federal Trade Commission may bring suit in federal district court to seek an injunction where a person "is violating, or is about to violate, any provision of law enforced by the [Commission]" and an injunction "would be in the interest of the public." *Id.* § 53(b).

2. In *true* emergencies readily distinguishable from the circumstances in which EPA routinely employs administrative orders, administrative law statutes typically provide, at a minimum, for prompt post-issuance process. The Atomic Energy Act, 42 U.S.C. §§ 2011 *et seq.*, authorizes the Secretary of Energy to issue orders to "prohibit the dissemination" of sensitive information related to nuclear weapons and atomic energy in light of the critical governmental interests in secrecy concerning nuclear weapons and energy and the prevention of nuclear proliferation. *Id.* § 2168(a)(2). The Secretary may issue such orders where "dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." *Id.* But anyone affected by such an order may seek immediate judicial review. *See id.* § 2168(d) (citing 5 U.S.C. § 552(a)(4)(B)). Even in this near-doomsday scenario, the statutory regime provides for immediate review.

Similarly, the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, authorizes the Securities and Exchange Commission summarily to take action to restore order to financial markets and ensure proper settlement of transactions in emergencies—namely, "major market disturbance[s]" such as "sudden and excessive fluctuations of securities prices generally" or major disruption to "the functioning of securities markets." *Id.* §§ 78*l*(k)(2),

(7)(A). Even in these emergency situations, however, the Act provides for expeditious review in a United States Court of Appeals. *See id.* § 78y(a).

The Commodity Futures Trading Commission Act, 7 U.S.C. §§ 1 *et seq.*, likewise allows unilateral action in emergencies but permits immediate judicial review. The Act authorizes the Commodity Futures Trading Commission "to direct" certain parties to set "temporary emergency margin levels on any futures contract" when the Commission "has reason to believe that an emergency exists." *Id.* § 12a(9). But it also permits an affected party to seek review immediately before a United States Court of Appeals. *See id.*

3. Another category of administrative law statutes provides dual tracks for emergency and non-emergency situations. Those statutes reflect Congress's understanding that the degree and timing of due process protection is appropriately tethered to the degree of underlying exigency.

Under the Federal Aviation Act, 49 U.S.C. §§ 40101 *et seq.*, the Administrator of the Federal Aviation Administration may suspend or revoke an operating license for purposes of safety or otherwise to protect the public interest. *Id.* § 44709(b). Notice and "an opportunity to answer" are mandated, "[e]xcept in an emergency." *Id.* § 44709(c). In an emergency, the Administrator's order becomes effective immediately, *see id.* § 44709(e)(2), but the affected party may immediately submit a petition for review by the National Transportation Safety Board ("NTSB"), *see id.* § 44709(e)(3). The NTSB must

review and decide the petition no more than *five days* after it is filed. *See id.*

The Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328, employs a similar dual scheme. In non-emergency situations, the Secretary of the Interior, who has authority to investigate violations, must "issue a notice to the permittee" and "provid[e] opportunity for public hearing." *Id.* § 1271(a)(3). By contrast, in emergency situations involving "imminent danger to the health or safety of the public" or "imminent environmental harm," the Secretary has authority to issue a cessation order without providing pre-deprivation process. *Id.* § 1271(a)(2). The adversely affected party, however, may immediately seek relief from the order, and the Secretary must respond to the request within five days. *See id.* § 1275(c). If unsuccessful, the affected party may then seek an adjudicatory hearing followed by judicial review. *See id.* § 1276. Because the "mine operators are afforded prompt and adequate post-deprivation administrative hearings and an opportunity for judicial review," these emergency cessation orders provide adequate due process. *Hodel*, 452 U.S. at 303.

4. Against that broader background of administrative practice, EPA's administrative order scheme is an outlier. To be sure, EPA itself uses unilateral orders to such an extent as to make the practice routine in the enforcement of many environmental statutes. *See* pp. 4-7, *supra*. But EPA's widespread pattern and practice of issuing onerous administrative orders without timely due process protections does not make it constitutionally

palatable; it only underscores the need for judicial review.

Under other statutory provisions, moreover, EPA enforces the environmental laws without wielding such extraordinary and effectively unchecked authority. For example, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692, requires the EPA Administrator to commence a civil action in federal district court in order to seize an "imminently hazardous chemical substance" or obtain relief against persons who manufacture, process, distribute, or use such substances, even though there is a far greater exigency there than here. *Id.* § 2606.

The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, distinguishes between "imminent hazard" situations and "emergency" situations. *Id.* § 136d(c). If the EPA Administrator determines that suspension of a pesticide registration is necessary to prevent an "imminent hazard," he or she must notify the registrant prior to any suspension so the registrant has an opportunity to seek an administrative hearing as to whether an "imminent hazard" in fact exists. *Id.* § 136d(c)(1). Any hearing, moreover, must take place within five days of the request for that hearing. *See id.* § 136d(c)(2). Any final order following an expedited hearing is then subject to immediate judicial review in district court. *See id.* § 136d(c)(4). If, on the other hand, the EPA Administrator determines that an "emergency" prevents a pre-suspension administrative hearing, the suspension is immediately reviewable by a district court. *Id.* § 136d(c)(3)-(4).

Meanwhile, the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, allows the EPA Administrator to issue "emergency orders" where "necessary to protect public health or welfare or the environment" without filing a civil action in federal court, as it would in an ordinary abatement action. *Id.* § 7603. But even these emergency orders can remain in effect for "not more than 60 days," unless the EPA Administrator brings an action in federal court to seek an extension. *Id.* If nothing else, that provision confirms that Congress did not view timely judicial review as being inconsistent with EPA's legitimate environmental mission.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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September 30, 2011

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Thank you,

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