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 *AMICUS CURIAE* OF ERNEST M. PARK AND LAUREN KENT PARK IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a Jurisdictional Determination that is conclusive as to federal jurisdiction under the Clean Water Act, and binding on all parties subject to judicial review under the Administrative Procedure Act?

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* state the following:

Ernest M. Park is a natural person and has no ownership interest in any party.

Lauren Kent Park is a natural person and has no ownership interest in any party.

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INTEREST OF *AMICI CURIAE*[1]

Ernest M. Park and Lauren Kent Park are residents of the State of Connecticut. They own property in Fairfield County, Connecticut which is zoned for residential use. Mr. and Mrs. Park have spent their life savings to purchase the property. The property was unimproved when purchased, except for an abandoned gravel driveway, and the Parks have spent additional tens of thousands of dollars and several years to obtain all required local and state approvals to improve their property and build a house thereon. But after they obtained the local and state approvals and had begun work to improve a pre-existing gravel driveway leading from the public roadway into their property the United States Army Corps of Engineers ("Corps") asserted that it had regulatory jurisdiction because the property contained a regulated wetlands and demanded that the Parks halt work and obtain one

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[1] Pursuant to Rule 37.2(a), timely notice of intent to file this *amicus* brief was provided to the parties and the parties have consented to the filing of this brief. Petitioner has lodged with the Court its consent to the filing of amicus briefs in support of either party. Respondent has consented to the filing of this *amicus* brief.

Pursuant to Rule 37.6, *amici* 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* or their counsel made a monetary contribution to the preparation or submission of this brief.

or more federal permits. The Parks then spent three additional years and additional tens of thousands of dollars challenging the Corps district engineer's jurisdictional determination ("JD"), only to have the JD affirmed by the Corps regional office. In addition, they have paid, and will continue to have to pay, thousands of dollars of state and local real property taxes on their property which has been rendered essentially useless because of Corps's threats to impose harsh and burdensome fines and penalties if they improve the property without obtaining federal permits.

The Parks wish to challenge the JD in federal court, but if the Fifth Circuit's decision in this case is allowed to stand, and if the Second Circuit follows that precedent, the Parks will likely be unable to afford the additional hundreds of thousands of dollars and approximately two years to pursue the federal permitting process before they can obtain review by an impartial Article III court.

INTRODUCTORY STATEMENT

The Petitioner asserts that "[t]his case raises questions of statutory and constitutional law of importance to tens of thousands, if not all, landowners in the Country." Pet. 4. The Parks' story illustrates the immense burdens the Jurisdictional Determination process employed by Corps imposes on landowners and the additional, and well-nigh insurmountable, barriers that would be imposed if land owners whose property has been deemed a jurisdictional "wetlands" had to go through the full permitting process before they could seek review by an impartial Article III court.

In *Rapanos v. United States*, 547 U.S. 715, 521 (2006) this Court noted that the wetlands permitting process under the Clean Water Act ("CWA") took on average more than two years and costs on average more than $271,000. In the experience of *amici*, that is just a fraction of a multi-year and several hundred thousand dollar process (including obtaining local and state permits) that imposes delay after delay and immense costs on property owners.

In 2004 *amici* purchased an eight (8) acre wooded building lot plus a six (6) acre parcel that was a "conservation easement"[2] in Weston, CT for approximately $212,000. The building lot is zoned for single family residential use. *Amici* planned to

[2] The easement had been demanded by the town conservation commission from a prior owner.

purchase and install a modest modular home on the property, at a cost of $285,000, including site preparation, foundation, customization, and septic system.

During an approximately three year period *amici* applied for local permits to repair a pre-existing driveway[3] and underground utilities on the property (17 times in total) and awaited receipt of those permits. They hired multiple engineering firms and law firms, did test borings and other work required by town authorities, and satisfied all the concerns of the town conservation commission, and finally in January 2007 the Parks received a permit from the town to repair the existing driveway so that delivery vehicles and construction equipment could reach the location in the interior of their lot where they wanted the house to be built.

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[3] The driveway had been built in the mid 1980s by a previous owner of the property. It is approximately 1,300 feet (one quarter mile) long, and runs from a cul de sac that is a public street to an elevated knoll on the property on which the *amici* planned to build the house. Vegetation had been cleared to put the driveway in, but it had grown back and the driveway had fallen into disrepair. The driveway needed to be upgraded to permit it to be used by heavy vehicles needed to transport the house modules to the place the house was to be built. In the 1800s there had been an old "corduroy" road at the same location; that road had been used to transport trees, logs and timber that was harvested from the forest on the property.

Amici spent out-of-pocket approximately $205,000 in consultant and legal fees, plus an additional $33,000 for sanitation permits and underground pipes the town conservation commission required them to install for drainage and to enable turtles to cross under the driveway. The Corps stopped them from installing the pipes (after having initially told them orally that the Corps had no issue with installation of the pipes) and excavating for the foundation of the house. In total, they spent at least $240,000 – more than they had paid for the land itself – for permits and preliminary work demanded by the conservation commission, even before the Corps got involved.[4]

Amici made preparations to repair the driveway, including purchasing gravel and drainage pipes and retaining a contractor. But in late September 2008, after they had started work on the driveway and had put down a substantial amount of base material, as the town had authorized (and just weeks before completion of the driveway repair), the Corps sent a cease and desist letter, threatening the daily fines and imprisonment if *amici* took any further steps to prepare the site of the house or repair the gravel driveway. *Amici* sent a reply asserting that the Corps has no

[4] In addition to these direct costs of obtaining approvals, the Parks have paid approximately $60,000 in real estate taxes on the property since purchasing it.

jurisdiction, but stopped work rather than risk ruinous penalties.[5]

Amici spoke with Corps and it became apparent that the agency incorrectly believed that the property was directly adjacent to a river which in fact is about 60 miles from the property. *Amici* described the location of the property and the river clearly and also sent a letter from their engineer stating that the property has no connection whatsoever to any navigable waterway.

From December 2008 to March 2010 *amici* tried to arrange an on-site meeting with the Corps. Meetings were scheduled and cancelled several times. The delays were caused mainly by frequent changes in personnel at the Corps' district office.

In June 2010 a Corps project manager finally came to the site and walked the property, the neighboring properties and beyond, to the border with the next town. A few weeks later the Corps' project manager proposed that *amici* apply for an "after the fact" permit, and accede to "mitigation" measures.[6]

In August 2010, *amici* asked the Corps' project manager to explain how isolated "wetlands" on their property have any relation to "navigable

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[5] The 36-inch diameter pipes are still lying on the property, deteriorating.

[6] The Corps permitting authority is set forth in CWA § 404(a), 33 U.S.C. § 1344(a).

waters" or interstate commerce. The response was an email threatening to refer the case to the Environmental Protection Agency ("EPA") if *amici* did not respond in writing regarding "unauthorized" activity on the property. *Amici* responded by sending the Corps' project manager their full engineer's report that showed that any "wetlands" on the property had no connection to interstate or navigable waters.

It was not until mid-August 2012, more than two years after she had seen the property first hand, that the Corps' project manager replied that she was in the process of completing a formal Jurisdictional Determination ("JD"). In fact it was not until the second week of September 2012, more than *five years* after *amici* had gotten town approvals, and *four years* after the Corps' initial cease and desist letter, that *amici* received a letter reiterating that they were in violation and stating the Corps' district office had determined the "wetlands" on the property are "jurisdictional."

By early December 2012 *amici* had still not received a copy of the final JD, and they again requested it, along with all information used in developing the Corps' final determination, including data, maps, photographs, and other documentation the Corps used in making its determination. A month later, on January 10, 2013, *amici* received the JD and a "tolling agreement."

On April 18, 2013 *amici* submitted their appeal of the JD to the Corps' "Regulatory Appeals

Review Officer." A few weeks later they met with the Review Officer, the Corps' Project Manager and a Corps' Senior Soil and Wetland Scientist at the property. The Review Officer later upheld the District's Jurisdictional Determination.

Amici then appealed the Review Officer's decision to the North Atlantic Division of the Corps. It was not until January 2014 that they received an "Administrative Appeal Decision" upholding the New England District Engineer's "approved jurisdictional determination." The cover letter from Commanding General of the Corps' North Atlantic Division stated "*My decision on your request for appeal concludes the administrative appeal process*. However, this does not preclude you from filing a permit application for any work you propose in the jurisdictional areas." (Emphasis supplied.)

The JD process itself has taken almost six years, and the *amici* have already incurred tens of thousands of dollars in costs for engineering, hydrology and environmental expert reports they have used the Corps' JD process. Their out of pocket expenditures they have incurred during the JD process are almost equal to the amount recited in *Rapanos* as the time to obtain a permit, and delays imposed on them during the JD process exceed substantially the time stated in *Rapanos* for the permit process.[7] The costs and delays *amici*

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[7] In addition to direct costs to *amici* of the Corps' (continued...)

have incurred in seeing the JD process through do not, of course, include the additional time and expense they would necessarily incur if they were to submit to the Corps' detailed, exhausting, time-consuming and expensive permitting process.

Amici are individuals of modest means – Mr. Park is a computer engineer and Mr. and Mrs. Park own and operate a small business that renders computer consulting services to other small and medium-sized businesses – and they have expended their life savings to buy the land, obtain local permits and deal with the Corps during the JD process. Their experience with local and federal processes for accomplishing the simple goal of building their modest "dream home" has drained them of their financial resources and physical energy.

What is unduly burdensome for a business such as Kent Recycling is unbearable and intolerable for the thousands of individuals whose property the CWA enforcement agencies claims to regulate, and does regulate in draconian fashion.

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[7](...continued)
permit process, *amici* have paid approximately $163,000 to rent a house to live in for the four years after receiving local approvals and during the period the Corps was "working on" its jurisdictional determination, a cost which would have been unnecessary had they been able to build the house on the property in a reasonable time and about $22,000 in real estate taxes during that same period.

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S HOLDING THAT A JURISDICTIONAL DETERMINATION IS NOT APPEALABLE TO AN ARTICLE III COURT CONFLICTS WITH THIS COURT'S JURISPRUDENCE

The Fifth Circuit's holding that a landowner is not entitled to immediate judicial review of a CWA JD, even though the determination is the agency's final word on its understanding of the extent of federal jurisdiction with respect to the property in question, establishes a dangerous precedent that, as a practical matter, will make it impossible or impractical for many property owners to resist unwarranted exercise of power by the regulatory agencies. The Fifth Circuit's decision conflicts with *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012), in which this Court held unanimously that an assertion of federal jurisdiction, through the issuance of a compliance order, is "final" and subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 702, 704. Like the compliance order in *Sackett*, the JD in this case has immediate and direct legal consequences. It is an adjudicative decision that applies the law to the specific facts of a case and is legally binding on the agency and the property owner.

Under the decision, the property owner has three options: (1) engage in a costly, time consuming and very likely futile permitting process; (2) maintain the landowner's legal position that Corps does not have jurisdiction and proceed without a permit, risking ruinous fines of $37,500 or more a day and imprisonment[8]; or (3) abandon his planned use of the land and in many cases lose the property to tax liens. These are not reasonable options.

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[8] Federal regulations authorize the Corps to delineate a wetland by issuing a "Jurisdictional Determination" (JD). *See* 33 C.F.R. § 320.1(a)(6). A Jurisdictional Determination involves a detailed site-specific analysis that identifies the nature and extent of waters on a particular parcel of land by applying statutory, regulatory, and judicial standards to determine federal jurisdiction over a that parcel. A Jurisdictional Determination is subject to administrative appeal; after that appeal is decided it constitutes "final agency action," 33 C.F.R. § 320.1(a)(6) and is dispositive of the issue of federal jurisdiction, *see* 33 C.F.R. §§ 331.2, 331.3.

Unless exempt, discharge of a pollutant into jurisdictional waters is prohibited without a federal permit. *See* 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). Failure to obtain a permit for such a discharge exposes the person responsible to severe penalties: a party who discharges dredged or fill material into "navigable waters" without obtaining a permit is subject to civil penalty of up to $37,500 per day (adjusted for inflation) and imprisonment for not more than 1 year for negligent violations, 33 U.S.C. § 1319(b), and criminal penalties of up to double the fine and imprisonment for up to three years, for knowing violations, *see* 33 U.S.C. § 1319(c).

CWA § 404(a), from which the Corps derives its permitting authority, provides "[t]he Secretary may issue permits. . . for the discharge of dredged or fill materials into the navigable waters at specified disposal sites." CWA § 502(7), 33 U.S.C. § 1362(7) defines the term "navigable waters" as "the waters of the United States, including the territorial seas." EPA and the Corps have defined "waters of the United States" in various ways, often quite expansively[9], but this Court has

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[9] The CWA regulations define "waters of the United States" to mean:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(I) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or . . .

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(continued...)

rejected the agencies' broad definitions and has criticized the government for overreaching and abusing its power under the CWA. *See Rapanos v. United States*, 547 U.S. 715 (2006) (plurality holding that the agency's expansive interpretation of the CWA is overly broad and creates federalism problems.); *see also Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (regulation of remote ponds exceeds statutory authority and raises constitutional questions.); and *Sackett v.*

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[9](...continued)

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;(7) The territorial seas;

(8) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of this section.

33 C.F.R. § 328.3(a) (2005).

Federal regulations define "adjacent" as "bordering, contiguous, or neighboring." 33 C.F.R. § 328.3(c).

Federal regulations authorize the Corps "to issue formal determinations concerning the applicability of the Clean Water Act . . . to activities or tracts of land and the applicability of general permits or statutory exemptions to proposed activities." 33 C.F.R. § 320.1(a)(6); 325.9.

The Corps has an administrative appeal process through which it reviews initial Jurisdictional Determinations. 33 C.F.R. § 331.

The CWA regulations recite that:

"A determination pursuant to this authorization shall constitute a Corps final agency action." 33 C.F.R. § 320.1(a)(6).

Environmental Protection Agency, 132 S. Ct. 1367, 1375 (2012) (the "reach of the Clean Water Act is notoriously unclear" and that the regulators deem that "any piece of land that is wet at least part of the year" may be covered by the Act, "putting property owners at the agency's mercy." Alito, J. concurring.)

In *Rapanos*, the plurality defined "navigable waters" as traditional navigable waters (capable of use in interstate commerce) and nonnavigable but relatively permanent rivers, lakes, and streams, as well as abutting wetlands, with a continuous surface water connection to traditional navigable waters. 547 U.S. 715, 739-42. Justice Kennedy, in a concurring opinion took the position that the CWA covered wetlands with a "significant" physical, biological, and chemical connection to a traditional navigable water. *Id*. at 779.

In practice, the EPA and the Corps assert broad federal jurisdiction over wetlands under either the *Rapanos* plurality's "continuous surface water" test or Justice Kennedy's "significant nexus" test. *See Definition of "Waters of the United States' Under the Clean Water Act,"* Proposed Rule, 79 Fed. Reg. 22188 (Apr. 21, 2014).[10]

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[10] The Corps and the EPA assert regulatory authority over much land in the United States through an expansive definition of jurisdictional waters, which they claim includes tributaries, ditches, ponds, ephemeral streams, drains, wetlands, riparian areas and "other waters." *See* Proposed Rule, *supra*, 79 Fed. Reg. 22188, (continued...)

Because of the agencies' proclivity to overreach in asserting of jurisdiction, it is essential that a landowner have practical and prompt access to an independent, impartial court in which the landowner can preserve and protect his property rights by challenging the government's erroneous assertion of jurisdiction.

Under the Administrative Procedure Act, "agency action" is final and subject to judicial review if it (1) represents the consummation of agency decision-making on the matter and (2) "must be one by which 'rights or obligations have been determined,'" or from which "legal consequences will flow." *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). An agency action may be final if it determines "rights or obligations." *Sackett*, 132 S. Ct. at 1371.

The Fifth Circuit held that the JD marked "the consummation of the Corps's decisionmaking process as to the question of jurisdiction" and was not subject to further agency review (even during the permit process) and was, therefore, binding on all parties as to jurisdiction. App. A-10.[11] But the

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[10](...continued)
22262-63 (Apr. 21, 2014). We submit that the agencies' concept of their wetlands jurisdiction is overbroad.

[11] In *Sackett*, this Court held a compliance order "marks the 'consummation' of the agency's decisionmaking process" because "the 'Findings and Conclusions' that the compliance order contained were not subject to further (continued...)

Fifth Circuit held that landowners have an adequate remedy because they can challenge a JD in court after obtaining or being denied a permit.

The JD process itself produces a detailed factual record and entails the application of the law to those facts. Remitting a property owner to an expensive, lengthy and resource consuming permit process does not clarify the law nor add to the facts in a way that would be helpful to a reviewing court, and so is a superfluous act which the law does not require. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 74 (1980).

The court of appeals held that the Jurisdictional Determination "is [merely] a notification of the property's classification as wetlands but does not oblige [the landowner] to do or refrain from doing anything to [the] property," App. A-13, and a landowner must go though the permit process before it can challenge the JD in court. Although the permit process "can be costly for regulated parties"

> [t]o be final, an agency action also must be one for which there is no adequate

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[11](...continued)
agency review." *Sackett*, 132 S. Ct. at 1372. In *Sackett* a determination of federal jurisdiction was the predicate to a finding of a violation, analogous to the Jurisdictional Determination in this case. The Jurisdictional Determination in this case, which has been affirmed on administrative appeal, is as conclusive as the compliance order in *Sackett*.

> remedy in a court . . . . [The landowner] may have an adequate judicial remedy because it could apply for a Corps permit and, if the Corps denies the permit, challenge the denial and the underlying jurisdiction in court.

App. A-19 n.4.

The Fifth Circuit is plainly wrong. The determination by the Corps that a wetland is subject to its jurisdiction and that the landowner needs a permit to work on the land has an "immediate and practical impact" on the property owner. The JD is notice that working on the land without a permit (except for exempt activities) will subject the landowner to potentially ruinous civil and criminal penalties and possible loss of liberty. If activity takes place without a permit, the Corps will issue a cease and desist order enforceable by civil and criminal penalties. *See* note 8, *supra*. A JD process culminates in an adjudicative decision that prevents a landowner from conducting lawful activity on his property despite the landowner's contention that the JD is incorrect as a matter of fact and law.

The Fifth Circuit's notion holding that a JD is not final because it does not affect the landowner's right or obligations is also clearly wrong. The very initiation of the permit process, and any permit decision by the Corps, is grounded in the Corps' determination that the property contains "jurisdictional" wetlands. If an owner seeks to use the property without a federal permit the Corps (or

EPA) will base enforcement action on the JD. Indeed, a final JD is a *sine qua non* of commencement of an enforcement action. The Corps' division level decision affirming the Jurisdictional Determination states that it is final agency action, leading the landowner and others to believe they must accede to the Corps' position. It is hard to conceive of a clearer case of final agency action. It is absurd for the government to assert that a JD has no legal effect and is not intended to determine a legal "right or obligation" when the agency's regulations provide that a "determination pursuant to this authorization shall constitute a Corps final agency action" 33 C.F.R. § 320.1(a)(6), and the agency advises the property owner that decision after an administrative appeal "concludes the administrative appeal process" and threatens to impose onerous fines and penalties if a property owner proceeds with work without first undertaking elaborate procedures and expending extensive resources to seek a federal permit.

A JD causes an immediate, unavoidable, and substantial deprivation of constitutionally protected property interests. It requires a landowner to change its plans and conduct and is not "abstract, theoretical, or academic," *Frozen Food Express v. United States*, 351 U.S. 40, 43-44 (1956). At the very least it compels the landowner to submit to an agency that

> exercises the discretion of an enlightened despot. . . .The average applicant for an individual permit spends 788 days and

> $271,596 in completing the process. . .not counting costs of mitigation or design changes . . . . These costs cannot be avoided, because the Clean Water Act "impose[s] criminal liability," as well as steep civil fines, "on a broad range of ordinary industrial and commercial activities."

Rapanos, 547 U.S. 715, 721 (Plurality opinion. Internal citations omitted.).

The Fifth Circuit held that an owner who wishes to improve his property or conduct activity on it can only obtain judicial review of an agency jurisdictional determination if that owner either (I) applies to the Corps (or EPA) for a permit and then seeks judicial review if a permit is denied or issued subject to onerous conditions, or (ii) ignore the JD, conducts the planned activities and runs the risk of immense fines and possibly even criminal prosecution and imprisonment, and then contest the penalties the Corps (or EPA) levies. This creates a dilemma that is intolerable and unnecessary.

There is no certainty that the permit would be granted, or, if granted, would not be conditioned on impracticable or economically unreasonable conditions, including "voluntary" conservation easements or even "donation" of part of the property to conservation trusts. These monetary and other expenditures by the property owner would by unnecessary if an article III court were

ultimately to overrule the Corps' assertion of jurisdiction.

The costs and delays inherent in the permit application process are prohibitive, *see Rapanos*, 547 U.S. 715, 721 (2006) (plurality opinion), and often will prevent the owner from defending her property rights. If a property owner then has to sue to have her objections heard by a court, and the court ruled that the Corps' JD was factually incorrect or beyond its jurisdiction, the landowner will be irreparably harmed.[12],[13]

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

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

(continued...)

The requirement that a landowner endure a lengthy and expensive permit process in order to obtain impartial review by an Article III court renders the right to such review ephemeral for many property owners, especially individuals and small businesses. As a practical matter, only those who can afford to see the permit process through and bear the subsequent cost and delay of litigation – which can easily amount to hundreds of thousands of dollars and several years – with no prospect of recovering the substantial costs of that course of action – can ever be vindicated in court.

The mere requirement that the landowner pursue the permit process to the end forces that owner to concede, at least for a substantial time, that the Corps has jurisdiction – the very issue in dispute. The process gives the agency overwhelming leverage to wrest "voluntary" concessions from the landowner in the form of limitations on the owner's development rights or even cession of a part of the acreage to a private "conservation" group that has gained favor with the agency.

Of course, once the owner has been persuaded to "voluntarily" give up its rights in order to obtain a permit, it is no stretch to imagine that a court would find that the owner had suffered no injury at the hands of the agency, and thus the delayed

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[13](...continued)
"compliance is sufficiently onerous and coercive penalties sufficiently potent."

right to a judicial determination of jurisdiction becomes nugatory.

Pre-enforcement access to the courts is a critical check on agency abuse of the enforcement process and to protect the recipient from the practical effects of threatened penalties. Without judicial review at the time the order is issued, the recipient faces a dilemma: either comply with the order at substantial expense and perhaps irreversible injury to the recipient's property and liberty rights, or risk the potential imposition of heavy penalties for noncompliance if the order is sustained in a subsequent EPA enforcement action. EPA's decision whether and when to bring an enforcement action is entirely discretionary, and delay by the agency will result in accrual of massive monetary penalties and, potentially, imprisonment.[14]

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[14] Federal regulations authorize the Corps to delineate a wetland by issuing a "Jurisdictional Determination" (JD). *See* 33 C.F.R. § 320.1(a)(6). A Jurisdictional Determination involves a detailed site-specific analysis that identifies the nature and extent of waters on a particular parcel of land by applying statutory, regulatory, and judicial standards to determine federal jurisdiction over a that parcel. A Jurisdictional Determination is subject to administrative appeal; after that appeal is decided it constitutes "final agency action," 33 C.F.R. § 320.1(a)(6) and is dispositive of the issue of federal jurisdiction, *see* 33 C.F.R. §§ 331.2, 331.3.

Unless exempt, discharge of a pollutant into jurisdictional waters is prohibited without a federal permit.

(continued...)

A JD reduces the value of the property or makes it unmarketable, limits uses of the property, undermines the owners' proposed project, and increases costs. These effects can effectively deprive the landowner of viable economic use of her property.

A JD is an adjudicative determination that requires property owners to obtain a federal permit if they wish to improve or modify their land. Simply depositing a bucket of gravel on a driveway in the wetland areas is a violation. In effect, Petitioners are excluded from the regulated areas, just as *amici* herein have been excluded from completing repairs on an existing driveway or building their house for six years to date.

In *Sackett*, this Court held that a similar intolerable choice between surrendering development rights, knuckling under to the agency's demands, or risking massive civil and criminal penalties violates the due process requirements of the constitution.

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[14](...continued)
See 33 U.S.C. §§ 1251(a), 1311(a), 1362(6). Failure to obtain a permit for such a discharge exposes the person responsible to severe liability: a party who discharges dredged or fill material into "navigable waters" without obtaining a permit is subject to civil penalty of up to $37,500 per day (adjusted for inflation) and imprisonment for not more than 1 year for negligent violations, 33 U.S.C. § 1319(b), and criminal penalties of up to double the fine and imprisonment for up to three years, for knowing violations, *see* 33 U.S.C. § 1319(c).

The dilemma posed in this case of the right to contest jurisdictional determinations is no different, and affects tens of thousands of individual and small business property owners throughout the nation. The question presented by the petition for certiorari should be decided by this Court.

CONCLUSION

For the foregoing reasons, *amici curiae* urge the Court to grant the petition for a writ of certiorari.

December 1, 2014

Respectfully submitted,

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Subject: FW: Kent Recycling v. U.S. Army Corps of Engineers

From: Martin Kaufman [mailto:mskaufman@atlanticlegal.org]
Sent: Monday, December 1, 2014 2:01 PM
To: Reed Hopper; Solicitor General
Subject: Kent Recycling v. U.S. Army Corps of Engineers

Dear Counsel:

I attach an electronic version of our brief amicus curiae of Ernest and Lauren Park which was filed by FedEx and sent to you in hardcopy by Priority Mail from Cockle Printing.

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