No. 15-290

In The
Supreme Court of the United States

UNITED STATES ARMY CORPS OF ENGINEERS,

Petitioner,

v.

HAWKES CO., INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENTS

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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 Procedures Act?

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INTEREST OF AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37, the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) submits this brief *amicus curiae* in support of Respondents, Hawkes Co. Inc. et al. The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 325,000 members businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is reflection of American small business.

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[1] Counsels of record have both filed blanket consents to amicus filings in this case. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. The Legal Center files in this case because small business property owners have a great interest in preserving and protecting their property rights in the face of aggressive—and potentially erroneous—assertions of federal jurisdiction under the Clean Water Act (CWA). Of special concern here, small business property owners typically have limited financial resources and cannot afford the exorbitant costs of pursuing a Section 404 permit application where those costs are imposed as an effective condition for obtaining judicial review of an errant jurisdictional determination.

SUMMARY OF ARGUMENT

The Petitioner, Army Corps of Engineers (Corps), and the Environmental Protection Agency (EPA) enforce the Clean Water Act (CWA) with the threat of shock-and-awe penalties and criminal prosecution. But, unlike most federal regulatory regimes, the scope of the CWA's prohibition is vague at best. While the Act is clear in prohibiting unpermitted dredging or filling activities within areas deemed jurisdictional, it is anything but clear in spelling out jurisdiction.

The uncertain reach of the CWA, in turn, has a coercive chilling effect. In light of the ruinous penalties that EPA and the Corps threaten for even negligent violations, prudent counsel would advise against developing any portion of land that is even arguably jurisdictional without first obtaining a

negative Jurisdictional Determination (JD) from the Corps. That is the only safe way to proceed with development plans because a final JD is binding on the agency and civil litigants for a period of five years. The only other option—for an owner wishing to make use of the land—is to obtain a Section 404 permit from the Corps at great cost.

But if the owner has gone through the trouble of obtaining an expert opinion that the property is *non-jurisdictional*, it would be absurd to expect the owner to apply for a Section 404 permit that may be unnecessary. This is especially true given that the permitting process is exorbitantly expensive—often costing hundreds-of-thousands of dollars. Given those severe costs, most small business landowners are forced to abandon their plans for any portion of their property that might be considered jurisdictional—which means the property is treated as if it were effectively subject to a federal conservation easement. Simply put, the regime is cost-prohibitive for all but major corporations.

Nonetheless the Corps insists that landowners must submit to the CWA's burdensome permitting process even in cases where the agency may potentially lack jurisdiction. Yet, once the Corps determines, with the issuance of an approved JD, that a property is subject to CWA regulation, the owner should have an immediate right to contest that assertion of jurisdiction. To be sure, it is the exclusive role of the judicial branch—not the executive—to determine the rights and obligations of individuals. Any contrary rule would result in due process violations, which is why the Administrative

Procedures Act authorizes judicial review whenever a final agency action purports to speak to an individual's rights or obligations under federal law.

And there can be no question, in this case, that the JD determined Respondent's rights and obligations under the CWA. With issuance of an affirmative JD, the Corps effectively asserted an environmental easement over the land—demarcating what portions the owner was forbidden from using without the Corps' express approval. But if the Corps has wrongfully asserted jurisdiction, then this effective restriction on use was imposed without due process of law. Thus judicial review is required under the APA, and is fundamentally necessary in order to avoid a potential constitutional violation.

ARGUMENT

I. The Agency Would Require Landowners to Either Submit to a Prohibitively Expensive and Potentially Unnecessary Permitting Regime, or Risk a Ruinous Enforcement Action

A. Judicial Review is Necessary to Keep the Agency From Overstepping its Authority

The jurisdictional "reach of the Clean Water Act [CWA] is notoriously unclear." *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367, 1375 (2012) (observing that "[a]ny piece of land that is wet at least part of the year is in danger of being

classified … as wetlands covered by the Act…").[2] On three occasions this Court has attempted to clarify the CWA's reach, but has been unable to agree upon a single test for determining the scope of CWA jurisdiction. *Rapanos v. United States*, 547 U.S. 715 (2006); *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001); *United States v. Bayview Homes*, 474 U.S. 121 (1985).[3] In *Rapanos*, a plurality would have held that, in order to assert jurisdiction, the agencies must establish a "continuous surface connection" between the property in question and traditionally

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[2] Some scholars have suggested that the CWA's jurisdictional provisions are so vague that they fail to provide constitutionally adequate notice to some affected landowners. *See* Jonathan H. Adler, Wetlands, *Property Rights, and the Due Process Deficit in Environmental Law*, Cato Sup. Ct. Rev., 2011-2012, 139, 161-62 (2012) (arguing that "'[M]en of common intelligence' lack notice that federal regulation of … [waters of the United States] may reach private lots in the middle of residential subdivisions that are completely dry much, if not most, of the year and lack any discernible nexus to navigable waters. … [E]ven well-informed landowner[s] could be unclear as to how far federal regulatory jurisdiction extends.").

[3] NFIB is among the numerous organizations and states challenging the legality of the recently promulgated "Waters of the United States" (WOTUS) Rule, through which EPA and the Corp now seek a radical expansion of CWA jurisdiction. 80 Fed. Reg. 37,054 (June 29, 2015). Accordingly, this Court may soon be called upon—once again—to decide whether these agencies are overreaching, and related questions. *Compare N. Dakota v. U.S. E.P.A.*, No. 3:15-CV-59, 2015 WL 5060744, at *1 (D.N.D. Aug. 27, 2015) (holding original jurisdiction to challenge the WOTUS Rule rests in the district courts); *with In re U.S. Dep't of Def., U.S. E.P.A. Final Rule: Clean Water Rule: Definition of Waters of U.S.*, No. 15-3839, 2016 WL 723241, at *114 (6th Cir., Feb. 22, 2016) (holding the Sixth Circuit has exclusive jurisdiction to hear challenges to the WOTUS Rule).

navigable interstate waters. *Rapanos*, 547 U.S. 715 (2006). By contrast, Justice Kennedy's significant nexus test would require a more complicated assessment of the "chemical, biological and hydrological connection between the property *and* other regulated waters." *Id.* at 779-80 (J. Kennedy concurring) (emphasis added).

Under both tests the burden of proof rests on the agency asserting jurisdiction. *Id.* at 780-82 (emphasizing that the agency must assess jurisdiction "on a case-by-case basis," and must demonstrate the requisite connection to navigable waters). Nonetheless, as a practical matter, once an agency definitively asserts that a property contains jurisdictional waters, it has effectively shifted the onus to the landowner to go to court if he or she disagrees. That would not be a problem if it were simply a matter of filing a complaint, as the agency would then have to justify its assertion of jurisdiction—based on facts in the record—in a court of law. And, facing the prospect of judicial review, the agency would therein have an incentive to make good faith assessments of jurisdiction. But the Corps' maintains that it should be insulated from judicial review.

The Corps holds out the possibility that a landowner might eventually be allowed to contest its jurisdiction in court—but only if the owner first pursues a Section 404 permit. The agency knows that this will effectively prevent the vast majority of landowners from contesting its assertion of jurisdiction—regardless of how egregiously wrong it may be in claiming regulatory authority over any

given property. This is because the Corps will not process a Section 404 permit application until it is deemed complete, and the process for completing such an application is exorbitantly difficult and expensive. *See Res. Investments, Inc. v. United States*, 85 Fed. Cl. 447, 460 (Fed. Cir. 2009) (explaining that federal regulations require the Corps to commence with public notice and review "within 15 days of days of the submission of a 404 permit application, but only if the application is [deemed] complete[,]" and noting an inexplicable 18 month delay during which time the Corps maintained a permit application was incomplete.) (citing 33 C.F.R. § 325.2). As such, the Corps "exercises the discretion of an enlightened despot," *Rapanos*, 547 U.S. at 720, knowing that it will not likely be held to account for a wrongful assertion of jurisdiction because—realistically—landowners of modest means cannot afford to jump these regulatory hurdles, much less litigate a case against the federal government after expending thousands of dollars on a potentially unnecessary permitting process.

B. A Wrongful Assertion of Jurisdiction Causes an Immediate Constitutional Injury

i. A Jurisdictional Determination Necessarily 'Determines' the Landowners' Rights and Obligations

The Corps contends that an affirmative jurisdictional assessment is of no legal consequence

because it merely clarifies the reach of the CWA. Pet. Opening Br. at 27. But even assuming that the agency is correct in its delineation of CWA jurisdiction, with regard to the property in question, it is sheer fantasy say that it has not therein "determined" the owner's "right or obligations." *See Bennett v. Spear*, 520 U.S. 154, 178 (1997) (holding that a final agency action may be challenged if "'rights or obligations have been determined,' ***or*** [if it is an action] from which 'legal consequences will flow[.]") (citing *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)) (emphasis added). For one, in definitively determining the scope of CWA jurisdiction, the agency has made clear what portion of the property the landowner is foreclosed from using in the absence of a federally issued permit. Pet. Opening Br. at 28-30 (acknowledging that the Corps will not revisit a final JD, except on the basis of new information). Conversely this delineation necessarily determines what portions of land the owner may safely develop without obtaining a permit.[4] *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter, No. 08-02 (June 26, 2008) (providing that an approved JD "can be relied upon … for five years."). Moreover, in many cases, once a jurisdictional assessment is made, that determination automatically triggers additional restrictions under state law, further limiting permissible uses of the land. *See e.g.*, *Barnum Timber Co. v. Environmental*

[4] Given how difficult it is for an ordinary person to understand the geographical reach of the CWA, most landowners will—as a practical matter—rely on the Corps' assessment. The Corps acknowledges that few landowners even seek to appeal an initial jurisdictional assessment within the agency. Pet. Opening Br. at 5-6.

Protection Agency, 633 F.3d 894 (9th Cir. 2013) (holding that a landowner had standing to challenge EPA action under the CWA because it triggered restrictions under California law, which resulted in devaluation of the property's value).

Yet, even if the owner should disagree with the Corps' conclusion that the land contains jurisdictional waters, the owner is practically bound. No reasonable person would proceed with development plans within an area deemed jurisdictional by the Corps without either (a) obtaining a judicial decision making clear that the property is non-jurisdictional, or (b) obtaining a federal permit to proceed. Any competent attorney would emphatically counsel against ignoring an affirmative JD because—once the Corps has made known its position that the property contains jurisdictional waters—a violation would no longer be deemed negligent.

At that point an unpermitted discharge would be deemed a "knowing violation," which would almost assuredly mean heavier civil penalties, if not criminal liability. 33 U.S.C. § 1319 (authorizing penalties of up to $50,000 per day, and imprisonment for up to three years, for knowing violations). And it can be no answer that EPA and the Corps might choose—in their benevolent discretion—to show restraint because they are statutorily bound to enforce the CWA. 33 U.S.C. § 1319(a)(3) (providing that when EPA "finds that any person is in violation" of the CWA, the agency "shall issue an order requiring such person to comply with [the Act] [and typically ordering the owner to

pay for environmental remediation], or … shall bring a civil action [to enforce the Act].”). To be sure, the EPA made a similar argument in *Sackett*, suggesting it only rarely seeks the statutory maximum when bringing a civil action, to which Justice Scalia quipped: “I’m not going to bet my house on that.” Transcript of Oral Argument at 30-31, *Sackett*, 132 S. Ct. 1367 (No. 10-1062).

ii. Without Opportunity for Pre-Enforcement Judicial Review, a Landowner’s Only Choice is to Abandon Development Plans or to Pursue a Costly Permit

In this case, as in *Sackett*, the property owner maintains that the agency has wrongfully asserted jurisdiction. If that is true, then the agency utterly lacks any basis in the law to regulate the subject property at all.[5] *See* Bernard H. Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 16-17 (2001) (explaining due process requires that a deprivation of property rights be founded in “legitimately enacted law.”). But by virtue of the Corps’ affirmative JD the owner is understandably afraid to proceed with development plans because the agency has implicitly threatened an enforcement action if he or she should disregard the Corps’ determination. As in *Sackett*, the agency means to “scare the owners into compliance—regardless of whether their

[5] Moreover, the facts alleged in a complaint must be presumed true at this stage of litigation. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

property [is] [or is not] a jurisdictional wetland..." Damien M. Schiff, Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 123 (2012).

In *Sackett*, this Court unequivocally rejected the suggestion that an individual should have to risk the threat of an enforcement action and "wait for the agency to drop the hammer" in order to obtain judicial review. *Sackett*, 132 S. Ct. at 1372. That was deemed an inadequate remedy because it would expose the Sacketts to "tens of thousands of dollars in civil penalties per day…" *Id*. at 1374 (Ginsburg, J., concurring). A requirement to risk ruinous penalties in order to have an opportunity to contest an erroneous assertion of jurisdiction is simply "unthinkable" "[i]n a nation that values due process, not to mention private property…" *Id*. at 1375 (Alito, J., concurring); *see also Ex Parte Young*, 209 U.S. 123, 146-47 (1908).

But here the Corps maintains that immediate judicial review of an affirmative jurisdictional determination is inappropriate because the Respondent may obtain judicial review after "applying … for a permit and then filing suit under the APA if [the application] is denied…" *Sackett*, 132 S. Ct. at 1372. While the Court was unanimous in holding this an insufficient remedy in *Sackett*, the Corps maintains that the prospect of judicial review of a permit denial should be sufficient here because—unlike in *Sackett*—no compliance order has been issued. Pet. Opening Br. at 42-43. Thus the agency maintains that Respondents, Hawkes Co.

Inc, et al. (Hawkes), stand in a different position than the Sacketts because: (a) the company has not been required to remediate any alleged violation; and (b) in the absence of a compliance order, Hawkes has no special burden to meet in order to qualify for a Section 404 permit. Yet this misses the point entirely because it ignores the reality that the Corps' assertion of jurisdiction has *already* interfered with the owner's right to freely use and enjoy the property.

1. Individual Permits Are Exorbitantly Expensive

The reality is that when faced with an affirmative JD, a small business landowner has only one option if pre-enforcement judicial review is unavailable. The owner must submit to a potentially illegally imposed regulatory regime.[6] Accordingly, most small business property owners will feel compelled to either abandon whatever development plans they might have in mind, or to pursue a federal permit to carry-out those plans. Either way, their constitutionally protected common law property rights are infringed, as if the property was deemed subject to a federal conservation easement.

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[6] The owner is faced with a Hobson's choice: either (a) ignore the jurisdictional determination, and risk crippling daily fines and or imprisonment, or; (b) submit to a potentially unlawful regulatory regime. This is an ultimatum with constitutionally repugnant choices on both sides of the equation. Yet, to the extent a choice must be made, any reasonable person would yield to the Corps' implicit directive to either: (i) leave the affected portions of the land undeveloped, or (ii) pursue a permit.

To be sure, if CWA jurisdiction is assumed without opportunity for judicial review, the owner has no choice but to operate within that regulatory framework. Under such a regime the owner is no longer free to proceed even with the most basic of plans. Something as simple as laying down mulch would be considered a "discharge of pollutants," and might result in crippling penalties. 33 U.S.C. § 1362(6). For this reason, the owner must be abundantly sure that he or she is covered by either a general or individual permit for any contemplated use.

In this case the Corps told Hawkes that it would need a special permit, which would cost over $100,000. Reply Br. of Resp. at 11. But, as of 2002 the *average* cost of pursuing an individual permit was $271,596. With inflation that figure must be adjusted upward to $357,826.[7] These figures include the cost of man-hours invested in working toward permit approval, as well as the cost of hiring outside experts to assist with compliance—including environmental testing and project redesigns. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 Natural Resources J. 59, 60 (2002).

Further, these regulatory hurdles prevent the owner from beginning any sort of development for

[7] *Amicus* relies on the CPI Inflation Calculator provided by the U.S. Department of Labor Bureau of Labor Statistics, available online at http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 29, 2016).

years at a time. *Rapanos*, 547 U.S. at 721 (noting that individual permits take on average 788 days). And that is assuming the Corps might eventually issue a permit. But, until the Corps deems a permit application complete, there is no end to the permitting process. Sunding & Zilberman, 42 Natural Resources J. at 64. For the affected landowner, that means development rights are restricted indefinitely. *Cf. Moore v. United States*, 943 F. Supp. 603, 612 (E.D. Va. 1996) (recounting testimony from former officials that—in order to avoid judicial review—the Corps rarely denies a permit application outright, but will instead typically request "more and more information … until eventually the applicant loses staying power…").

2. General Permits Burden Constitutionally Protected Property Rights

The Corps seeks to downplay these compliance costs, in part by insisting that "individual permits are the exception, not the rule, especially for smaller projects likely to be undertaken by individuals or small businesses." Pet. Br. at 47. Instead the Corps suggests that most small projects may be carried out under a "general permit," which authorizes "specific categor[ies] of activities deemed to have minimal [environmental] impacts." H. Michael Keller, *Look Before You Fill! Dredge and Fill Permitting Under § 404 of the Clean Water Act*, 17-Nov. Utah Bar B.J. 26, 32 (2004). Accordingly, a landowner might proceed with a

specified project under a general permit, but only if he or she is sure that the project is fully compliant with *regulatory restrictions imposed as a condition* of the Corps' approval. *Id*.

The situation is no different than if municipal authorities should purport to impose zoning restrictions on a specific parcel while denying the owner the right to contest the validity of those restrictions.[8] In this case, however, the landowner risks losing his or her home, or going to jail, if he or she should choose to ignore the authorities. To be sure, the landowner is not at all free—under this imposed regime—to exercise common law property rights. The requirement to obtain a general permit means that the landowner may only use the property on the Corps' terms. Steven G. Davison, *General Permits Under Section 404 of the Clean Water Act*, 26 Pace Envtl. L. Rev. 35, 68 (2009).

Thus for example, the owner may not initiate many projects without first providing the Corps with

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[8] There is no requirement to apply for a permit in order to ripen a due process claim. Such a claim ripens as soon as the restriction is definitively imposed. *See Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 349 (2d Cir. 2005) (holding a restriction may be challenged immediately if there is no procedure for variance); *see also Harris v. Cty. of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990) (recognizing a ripe due process claim where landowner was "deprived of the commercial use of his land and [required to] pay $2,400 to $3,000 to either regain that use, or prompt the County to make a final determination of how he can use the land."); *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895 (6th Cir. 1991) (holding a due process claim ripe because the landowner was "placed in a position where he would be required to expend considerable time, effort, and money to restore the *quo ante*.").

pre-construction notice at least 30 days. *Id*. at 69-70. For some projects a general permit will only be issued with express authorization from the agency—meaning that the Corps will scrutinize the project, and may require the owner to alter development plans to minimize potential impacts, or may impose other conditions restricting permissible uses as deemed appropriate to protect natural resources.[9] *Id*. at 70. For that matter, most general permit authorizations are conditioned on a requirement that the project must not affect more than one-quarter acre of land. Sunding & Zilberman, 42 Natural Resources J. at 65.

Further, some general permits require specific design elements—which may require costly project modifications. *Id*. at 66 (explaining a requirement mandating vegetative buffers). And many are expressly conditioned on a requirement that the owner must pay to mitigate any perceived impact on wetlands. Davison, 26 Pace Envtl. L. Rev. at 57. Thus notwithstanding the fact that a landowner might adamantly disagree with the Corps' assertion of CWA jurisdiction, the owner can only proceed under such a general permit to the extent he or she properly pays to mitigate for the alleged environmental impact—which necessarily imposes substantial costs.

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[9] By contrast, other general permits are deemed automatically granted if the owner proceeds in accordance with the stipulated conditions. *Id*. at 67. But if the Corps makes no individualized determination as to whether such a general permit should be issued, then *Amicus* questions what event would ever trigger an opportunity for judicial review under the Corps' theory that an approved JD may not be challenged in court?

And speaking of compliance costs, it is disingenuous for the Corps to suggest that general permitting costs are insignificant.[10] While it is true that the process of obtaining a general permit is more streamlined, the costs are still substantial. As of 2002 the average cost of a general permit was $28,915—which amounts to $38,095 in 2016.[11] *Rapanos*, 547 U.S. at 721. Such a toll on the right to use one's own property can hardly be considered inconsequential, especially if the requirement is imposed without any legitimate basis in the law.

[10] Also the process is not as straightforward as the Corps would suggest. For ranchers, farmers, and other ordinary landowners the process of obtaining a general permit may seem bewildering. They will typically either rely on direction from the Corps as to whether they may proceed with a contemplated project, or will be forced to invest limited time and energy trying to sort through available guidance, which in all likelihood will be difficult for someone who is not already well versed in the intricacies of environmental law.

[11] "The range of NWP costs was between $2,000 and $140,076 [or $2,635 and $184,549 with inflation]; the median cost was $11,800 [or $15,546 in 2016]." Sunding & Zilberman, 42 Natural Resources J. at 74.

II. The Administrative Procedures Act Should Not be Construed in a Manner that Would Facilitate Violations of Due Process

A. The Agency Inappropriately Presupposes its Jurisdictional Powers

The Corps maintains that its jurisdictional determinations have no legal effect whatsoever. Pet. Opening Br. at 27. This poker face argument proceeds on the theory that it was Congress—not the agency—that chose to impose development restrictions on the subject property. On this view the Corps is merely the harbinger of bad news when it determines that a property contains jurisdictional waters. But this is a straw man argument. The Corps never responds to the contention that the agency has unlawfully asserted regulatory authority over the property in question.

Instead the Corps engages in question-begging in much the same way as EPA did when defending its contention that landowners had no opportunity for judicial review of an enforcement order. *Sackett*, 132 S. Ct. at 1373. As in *Sackett*, the agency stubbornly defies "the APA's presumption of reviewability for all final agency action[.]" 132. S. Ct. at 1374. But at least in *Sackett* the agency attempted to offer a textual argument for why Congress might not have wanted to allow judicial review—though this Court ultimately found it uncompelling. *Id*. at 1373-74. Yet, unlike in *Sackett*, the agency defends its prerogative to evade judicial

review in this case merely be doubling-down on its (potentially errant) assertion that the property contains jurisdictional waters.

The Corps operates as if its determination of jurisdiction is beyond reproach. But the agency is far from infallible, and may be wrongly asserting jurisdiction here. *See e.g.*, *Res. Investments, Inc.*, 85 Fed. Cl. at 461-62. (noting that the Corps held up a project for approximately a decade after "'unreasonabl[y]' assert[ing] jurisdiction…"). And if the assertion of regulatory power over this property is wrongful then the Corps' JD is the source of the legal injury—not any act of Congress. But until an Article III Court is allowed to review the agency's assertion of jurisdiction it cannot be said whether or not the subject property really is subject to the CWA's restrictions. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803) (holding that executive actors are "officers of the law[,]" and that their actions are subject to judicial review when an individual's rights are affected).

B. It is the Exclusive Role of the Courts to Determine Legal Rights and Obligations

Under Article III, it is the role of the courts to determine questions of federal law, affecting the rights of individuals, because otherwise the executive would be allowed to act unchecked—*outside the law*. *St. Joseph Stock Yards Co.*, 298 U.S. 38, 84 (1936) (Brandeis J., concurring) ("The supremacy of law demands that there shall be opportunity to have some court decide whether an

erroneous rule of law was applied…"). A corollary principle is that an individual has a fundamental right to judicial review when his or her federal rights are adversely affected by final agency action. *See Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289 (1920); *Cf.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 330-31 (1816) (concluding that federal courts must be authorized to hear federal claims). Especially "[w]hen dealing with constitutional rights… [due process demands that] there [] be [an] opportunity of presenting … [to a court] every question of law raised…" *St. Joseph Stock Yards Co.*, 298 U.S. at 77 (1936) (Brandeis J., concurring); *see also* Sir. William Blackstone, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 137 (Oxford, Clarendon Press, 1765-69) (commenting on Chapter 29 of Magna Carta: "A third subordinate right of every Englishman is that of applying to the courts of justice for redress of injuries.") (alteration of original).

Thus judicial review is imperative for any executive determination of an individual's rights or obligations where a violation of due process would result from an errant determination.[12] And that is necessarily the case where the agency's determination effectively deprives an individual of liberty, or impairs property rights, without any legitimate basis in the law. *See* Nathan S. Chapman

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[12] *Marbury* emphasized that "where there is a legal right, there is also a legal remedy[,]" and that "the very essence of civil liberty consists in the right … to claim the protection of the laws…" 5 U.S. (1 Cranch) at 163.

& Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) ("Fundamentally, 'due process' meant that the government may not interfere with established legal rights without legal authorization..."). Accordingly, the Corps' position, in this case, raises grave due process concerns because it seeks to insulate its jurisdictional determination from judicial review—notwithstanding the reality that it has decided upon a question of law both as to the reach of its authority and the application of restrictions on the subject property.

Crowell v. Benson is instructive. 285 U.S. 22 (1932). The case concerned the proper application of the Harbor Workers' Compensation Act, which vested a commissioner of the Department of Labor with authority to issue compensation awards in cases where an employee was injured in the course of work occurring upon the "navigable waters of the United States." This jurisdictional provision was not merely a statutory restriction on the commissioner's authority, but also a constitutional limit. *Id.* at 54-55. Accordingly, in *Crowell*, an employer sought to contest a compensation award on the ground that the claimant's injury did not occur during the course of employment within the "navigable waters of the United States." *Id.* Writing for the Court, Chief Justice Hughes, was emphatic in affirming the prerogative of the courts in determining whether the executive branch had reached beyond its jurisdiction. *Id.* at 56; *see also Ng Fung Ho v. White*, 259 U.S. 276, 285-86 (1922) (holding that due process requires an opportunity to contest an alleged ultra vires executive decision affecting liberty or property).

These cases affirm that to deny the opportunity for judicial review would be to deny due process of law. For this reason the Administrative Procedures Act must be interpreted—under the canon of avoidance—so as to allow an affected landowner an immediate right of judicial review once the Corps issues a final determination that his or her property is subject to CWA regulation. *See Crowell*, 285 U.S. at 62 (construing a statute as authorizing judicial review to avoid due process concerns); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25, 134 (1974) (rejecting an interpretation of the Rail Act that would deny a judicial remedy for parties alleging a violation of constitutional rights, in part because of the "grave" constitutional problems that would arise). This is imperative both to protect the constitutional rights of individuals and to ensure that the Corps is acting *within the law*.

CONCLUSION

This Court should hold that landowners may seek judicial review under the Administrative Procedures Act once the Corps issues an affirmative JD, and affirm the judgment of the Eighth Circuit.

Respectfully submitted,

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