

No. 10-1062

IN THE
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,
Petitioners,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
and LISA P. JACKSON, Administrator.,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

**AMICUS CURIAE BRIEF OF THE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF AUTHORITIES..... | ii |
| INTEREST OF THE <i>AMICUS CURIAE</i> | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT..... | 4 |
| ARGUMENT..... | 6 |
| I. THE EPA’S COMPLIANCE ORDER VIOLATED THE DUE PROCESS RIGHTS OF THE SACKETTS..... | 6 |
| II. CONGRESS DID NOT INTEND TO LEAVE THE SACKETTS WITHOUT A CONSTITUTIONAL REMEDY UNDER THE ADMINISTRATIVE PROCEDURE ACT..... | 12 |
| CONCLUSION | 15 |

TABLE OF AUTHORITIES

| CASES | Page |
|--|--------|
| <i>Abbot Labs v. Gardner</i> , 387 U.S. 136 (1967)..... | 13, 14 |
| <i>Alaska Department of Environmental Conservation v. EPA</i> , 540 U.S. 461 (2004)..... | 13 |
| <i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)..... | 7 |
| <i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)..... | 13, 14 |
| <i>Davidson v. New Orleans</i> , 96 U.S. 97 (1877)..... | 7 |
| <i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568, 575 (1988)..... | 12 |
| <i>Ex Parte Young</i> , 209 U.S. 123, 148 (1908)... | 10 |
| <i>Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.</i> , 130 S. Ct. 3138 (2010) | 6, 10 |
| <i>Fuentes v. Shevin</i> , 407 U.S. 67 (1972) | 7 |
| <i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970) | 7 |
| <i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976) .. | 7 |
| <i>McNary v. Haitian Refugee Ctr., Inc.</i> 498 U.S. 479 (1991)..... | 14 |
| <i>MedImmune, Inc. v. Genentech, Inc.</i> , 549 U.S. 118 (2007)..... | 10 |
| <i>Nat'l Labor Relations Bd. v. Un. Food & Comm. Workers Union</i> , 484 U.S. 112 (1987)..... | 14 |
| <i>Ochoa v. Hernandez y Morales</i> , 230 U.S. 139 (1913)..... | 7 |
| <i>Rapanos v. United States</i> , 547 U.S. 715 (2006)..... | 8 |
| <i>Shalala v. Ill. Council on Long Term Care, Inc.</i> , 529 U.S. 1 (2000)..... | 14 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|-----------|
| <i>Sniadach v. Family Fin. Corp.</i> , 395 U.S. 337 (1969)..... | 7 |
| <i>Tennessee Valley Authority v. Whitman</i> , 363 F. 3d 1236 (11th Cir. 2003)..... | 4, 9 |
| <i>Thunder Basin Coal Co. v. Raich</i> , 510 U.S. 200 (1994)..... | 9, 10, 14 |
| <i>Wilkinson v. Leland</i> , 27 U.S. 627 (1829) | 7 |
| STATUTES | |
| Clean Water Act, Section 1319(c)(1)-(2) | 9 |
| REGULATIONS | |
| 33 C.F.R. Sect. 326.3(e)(1)(ii) | 8 |
| OTHER AUTHORITIES | |
| Andrew I. Davis, <i>Judicial Review of Environmental Compliance Orders</i> , 24 <i>Envtl. L.</i> 189, 223 (1994)..... | 10 |
| Richard A. Epstein, <i>Takings: Private Property and the Power of Eminent Domain</i> (Cambridge, MA: 1985)..... | 11 |
| Christopher M. Wynn, Note, <i>Facing a Hobson's Choice? The Constitutionality of the EPA's Administrative Compliance Order Enforcement Scheme Under the Clean Air Act</i> , 62 <i>Wash. & Lee L. Rev.</i> 1879, 1920 (2005)..... | 11 |

INTEREST OF THE *AMICUS CURIAE* ¹

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Harvard University Professor, Dr. James Q. Wilson; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

¹ Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the rights to property and to Due Process of Law protected by the Fifth Amendment.

STATEMENT OF THE CASE

Petitioners Chantell and Michael Sackett purchased a half-acre lot in a built-out area of residential development near Priest Lake, Idaho for the purpose of building their home on the property. Pet. App. A-2, E-2. Local authorities zoned their lot for residential construction, and provided an existing sewer hookup. Pet. App. E-2.

Obtaining all required building permits from the local authorities, the Sacketts employed contractors who began earthmoving work to prepare the site for home construction. Without any reason to think that such home construction activities on the dry land of their residential property in a residentially developed neighborhood involved the Clean Water Act (CWA) or the Environmental Protection Agency (EPA), Pet. App. E-2, the Sacketts nevertheless received a Compliance Order from the EPA effectively ruling *ex parte* that their home building activities had violated the CWA by illegally dumping fill materials into jurisdictional wetlands supposedly on their land. Pet. App. G. Somehow, the EPA found that the Sacketts moving earth around on their residential lot in a residential neighborhood involved “the discharge of a pollutant” into the “navigable waters” of the United States.

The Compliance Order required the Sacketts to immediately cease construction of their home, despite building authorization from the local authorities. Indeed, the Compliance Order required them instead to finance costly restoration work, removing all fill material and replanting, followed by a three-year monitoring period during which the Sacketts had to leave their residential land entirely untouched. Pet. App. G-4 – G-6, H-3. In addition, the Compliance Order imposed costly civil penalties on the Sacketts if they failed to comply with the Order’s dictates. Pet. App. G-7.

The Sacketts next found that there was nowhere they could challenge the EPA’s Compliance Order, at least without incurring costs and delays suited to a major industrial enterprise rather than to a retiring couple trying to build a modest home, or inviting bankrupting fines and even criminal penalties. The Sacketts first sought a hearing before the EPA. But the EPA ignored them. Pet. App. 3. The Sacketts then filed suit in federal court. But the District Court granted the EPA’s motion to dismiss the suit. Pet. App. at C-7.

The Sacketts appealed the dismissal to the Ninth Circuit. Despite the general presumption of judicial review of administrative actions, the court held that the CWA precludes judicial review of pre-enforcement actions such as Compliance Orders. Pet. App. 6.

The Sacketts argued that this would mean that the CWA authorizes liability for violations of Compliance Orders, even where the CWA has not been violated.

The Eleventh Circuit held in *Tennessee Valley Authority v. Whitman*, 363 F. 3d 1236 (11th Cir. 2003) in regard to an analogous section of the Clean Air Act (CAA) that such Compliance Orders would be unconstitutional if not subject to judicial review. But the Ninth Circuit read into the statute the right to challenge the validity of a Compliance Order if and when the EPA chooses to enforce it, and held that this satisfies constitutional requirements.

The court's ruling leaves the Sacketts then with only this choice. They can seek a permit from the EPA to discharge pollution into the navigable waters of the United States by building their home on a residential lot in a residential neighborhood, as a major industrial enterprise would have to do for real pollution, practically costing more than their property is worth and years of delay in the construction of their own home. Or they can ignore and violate the Compliance Order, incurring overwhelming civil penalties and even quite possibly criminal liability, hoping that a court would use its equitable discretion to set that aside.

The Sacketts requested a Writ of Certiorari from this Court, which was granted on June 28, 2011.

SUMMARY OF ARGUMENT

Petitioners Chantell and Michael Sackett purchased a residential lot in a residential neighborhood, zoned and permitted by local authorities for construction of their home. After they began earthwork

preparatory to such construction, they received a Compliance Order from the EPA effectively ruling that moving around dry earth and fill materials on their residential lot to begin their homebuilding project somehow involved discharge of a pollutant into the navigable waters of the United States in violation of the Clean Water Act. The Compliance Order commanded the Sacketts to cease construction of their home, bear the costs of restoring the property to its previous condition, undoing all of their construction activity, and leave the property untouched for a period of years, with no clear opportunity ever to commence building.

The Sacketts were denied any hearing to contest the Compliance Order by the EPA and by the courts below. The Ninth Circuit held that to get a hearing the Sacketts had the choice of bearing the intractable costs of applying for a permit to discharge pollution into the navigable waters of the United States by building their home on a residential lot, as if they were a major industrial enterprise actually engaged in real pollution, and then seek judicial review of any such denial, with no prospect of getting back the intractable costs of any such application. Or they could ignore the Compliance Order, running the risk of bankrupting fines and even criminal liabilities, and then raise their contesting claims in an enforcement action.

This Hobson's choice violates the constitutional requirements of Due Process of Law, which unquestionably protect Petitioners' property interest in building their own home. It involves a regulatory taking as well in violation of the Takings Clause, as

the Sacketts are indefinitely denied the use of their property for the residential purpose for which they purchased it, and any other meaningful use, effectively leaving them required to maintain it as a public park indefinitely. The Sacketts represent one example of potentially thousands of similar constitutional violations across the country.

Consequently, we submit the ruling of the Ninth Circuit below should be reversed.

ARGUMENT

I. THE EPA'S COMPLIANCE ORDER VIOLATED THE DUE PROCESS RIGHTS OF THE SACKETTS.

This case is about the EPA effectively taking the planned home of Petitioners Chantell and Michael Sackett in a manner reminiscent more of an authoritarian government than a liberal society governed by Due Process and property rights. The Sacketts are not the DuPont Chemical Company able to finance the application for a discharge permit, merely to build their own home on a residential lot in a residential neighborhood. Moreover, such home construction manifestly does not involve discharge of pollution into the navigable waters of the United States, and the Constitution requires that the Sacketts be allowed their day in court to raise that defense without incurring bankrupting EPA civil penalties, and quite possibly criminal liability, which they could only hope a court will equitably set aside. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

That Hobson's choice violates the Fifth Amendment's Due Process Clause. The property rights of homeowners are unquestionably protected by Due Process. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Wilkinson v. Leland*, 27 U.S. 627 (1829); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). Due process requires a meaningful opportunity to be heard before deprivation of a property interest. *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). As this Court said in *Fuentes*,

“The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of possessions....[T]he prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.”

407 U.S. at 80-81. The Court in *Fuentes* added further, “[T]he central meaning of procedural due process [is that] ‘parties whose rights are to be affected are entitled to be heard.’” 407 U.S. at 80.

The Sacketts have been undeniably denied a property interest. They purchased a residential lot in a residential neighborhood for the purpose of building a home. But the EPA's Compliance Order denies

them the right to build a home on their property, forcing them instead to maintain it effectively as a public park at their own expense, at a minimum for years. Moreover, since the EPA has already held that taking steps to prepare for the building of a home on the Sacketts' land somehow involves illegally discharging pollution into the navigable waters of the United States, there is no reason to believe that absent judicial intervention the Sacketts will ever be free to build their home.

The EPA's Compliance Order was issued with no notice or opportunity to be heard for the Sacketts. The Sacketts were consequently denied any opportunity to present any defenses or facts on their behalf. And at present, the Sacketts have no feasible recourse to get their defenses to an apparently confused EPA ruling even before a court to be heard. Under present EPA regulations, the Sacketts cannot even apply for a permit as the Ninth Circuit suggested. Once a Compliance Order has been issued, EPA regulations provide that "No permit application will be accepted" until the Compliance Order has been resolved. 33 C.F.R. Sect. 326.3(e)(1)(ii). Moreover, even if a permit application would be allowed, that is not remotely a practical, feasible option for the Sacketts. The average application for an individual permit costs \$271,596 and takes 788 days, or more than 2 years. *Rapanos v. United States*, 547 U.S. 715, 721 (2006)(plurality opinion).

In addition, there is no guarantee that after all of those costs and all of that delay, the permit to build their home would be granted, or granted with feasible

conditions. If the Sacketts then have to sue after a permit denial to finally get their objections heard by a court, and the court ruled that the Sacketts were right after all, they would have no recourse to get any of those unbearable permit application costs back. 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.”

Alternatively, the Sacketts can ignore the EPA’s Compliance Order and seek to raise their defenses when the EPA moves to enforce it. That course entails incurring EPA fines of as much as \$750,000 per month, \$9,000,000 for a year, for failure to obey the Compliance Order. Moreover, under the federal CWA statute, the Sacketts would have to run the risk of criminal liability as well, as Section 1319(c)(1)-(2) imposes criminal penalties for knowing violations of the Act. Yet, there is no guarantee that in such an enforcement action a right to raise defenses to the Compliance Order would be read into the CWA, as the Ninth Circuit did in this case, especially when the plain language of the statute unambiguously precludes it. Much less is there any assurance that a later court in such an enforcement action would disallow any fine on equitable grounds.

These reasons are exactly why the Eleventh Circuit in *TVA v. Whitman* found such a Hobson’s choice imposed by an EPA Compliance Order under a perfectly analogous provision of the CAA to be an

unconstitutional violation of the Due Process Clause. The same result is mandated by the opinion of this Court in *Thunder Basin*, where the Court concluded that lack of judicial review is unconstitutional where “the practical effect of coercive penalties for non-compliance is to foreclose all access to the courts,” and where “compliance is sufficiently onerous and coercive penalties sufficiently potent.” 510 U.S. at 216.

Indeed, over 100 years ago this Court similarly 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.” After almost exactly 100 years had passed, this Court again ruled in a similar situation 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.” *Accord: Free Enterprise Fund.*

Commentators have recognized the wisdom in these opinions. Davis writes, “The absence of direct review of compliance orders effectively coerces a recipient to comply with the order prior to EPA enforcement.” Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 *Envtl. L.* 189, 223 (1994). Similarly, Wynn writes that compliance

orders “can coerce a regulated party into a Hobson’s choice: Complying with the order may create an enormous financial burden on a company while the company awaits possible EPA enforcement, while ignoring the order may subject the party to severe criminal and civil penalties.” Christopher M. Wynn, Note, *Facing a Hobson’s Choice? The Constitutionality of the EPA’s Administrative Compliance Order Enforcement Scheme Under the Clean Air Act*, 62 Wash. & Lee L. Rev. 1879, 1920 (2005).

The Sacketts do not represent an isolated case of such bureaucratic abuse. From 1980 to 2001, the EPA issued 1,500 to 3,000 Compliance Orders each year across the country. Wynn, *supra*, at 1895.

Moreover, besides Due Process issues, this case involves Takings Clause concerns as well. The Sacketts purchased a residential lot in a residential neighborhood for the purpose of building a home. The arbitrary EPA Compliance Order that does not remotely seem to be grounded in any reasonable reading of the law deprives the Sacketts not only of that use of their property, but of any other reasonable use as well, for an indefinite period at least. We submit that this Court should rule that such an abominable bureaucratic abuse does involve a regulatory Taking in violation of the Constitution. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, MA: 1985).

Ultimately, all that Petitioners are asking for in this case is an opportunity for their day in court to

present their defenses to an EPA enforcement action which seems on its face to involve an arbitrary misreading of the law. The Due Process Clause of the Constitution requires that the Sacketts be allowed to present evidence as to whether construction of a family home on a dry residential lot in the middle of a built out residential neighborhood constitutes discharge of a pollutant into the navigable waters of the United States.

II. CONGRESS DID NOT INTEND TO LEAVE THE SACKETTS WITHOUT A CONSTITUTIONAL REMEDY UNDER THE ADMINISTRATIVE PROCEDURE ACT.

The unconstitutional violation of the Due Process rights of the Sacketts described above can be entirely avoided by interpreting the CWA as not foreclosing judicial review of EPA compliance orders under the APA. This Court has long held that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

That cardinal rule of statutory construction goes all the way back to Chief Justice John Marshall, directing that “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Id.* (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). That approach

“recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. [The Court] will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties.” *Id.*

Moreover, reading the CWA and the APA as providing for judicial review of the EPA Compliance Order regarding the Sacketts is, in fact, the most natural reading of Congressional intent in regard to those Acts. As this Court said in *Abbot Labs v. Gardner*, 387 U.S. 136, 140 (1967), the APA “embodies the basic presumption of judicial review to one ‘suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.’” The Court added further in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), “We begin with the strong presumption that Congress intends judicial review of administrative action.”

In addition, Congress expressly designed the APA to provide for judicial review of final agency action, 5 U.S.C. Sect. 704, which is exactly what the Compliance Order is in this case. *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004)(“ADEC”). The Compliance Order issued to the Sacketts involves a final decision in their case, the culmination of the EPA’s decision making process. There is no further administrative process that would provide any review of the order.

Indeed, the Compliance Order already imposes defined legal consequences on the Sacketts. *ADEC*, 540 U.S. at 483. The Order is immediately enforce-

able in court by the EPA against the Sacketts, with sanctions and penalties to be imposed. Section 309(b).

But the leading factor in determining the availability of judicial review under the APA is whether the party can otherwise obtain meaningful judicial review. See *Thunder Basin*, 510 U.S. at 207; *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1 (2000). That is based on the fundamental presumption that Congress would not intend to foreclose meaningful judicial review and thereby deny Due Process. *McNary v. Haitian Refugee Ctr., Inc.* 498 U.S. 479 (1991). But as discussed above, without review under the APA, there is no meaningful review available to the Sacketts, and the CWA as interpreted and enforced by the EPA against the Sacketts would involve an unconstitutional violation of their Due Process rights.

Finally, Congressional intent to deny judicial review will not be presumed unless clearly and unmistakably expressed in the statute. As this Court said in *Abbot Labs*, “[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.” 387 U.S. at 140. The Court added in *Nat’l Labor Relations Bd. v. Un. Food & Comm. Workers Union*, 484 U.S. 112, 131 (1987), “The statutory preclusion of judicial review must be demonstrated clearly and convincingly.” In addition, “where substantial doubt about the congressional intent exists, the general presumption favoring

judicial review of administrative action is controlling.” *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986).

But even the Ninth Circuit admitted that nothing in the language of the CWA specifically precludes judicial review of EPA Compliance Orders. Nothing in the legislative history of the Clean Water Act either provides any specific statement evidencing Congressional intent to deny judicial review of EPA Compliance Orders under the APA.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully submits that this Court should reverse the ruling of the Ninth Circuit below.

Respectfully submitted,

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