No. 13-599

In the
Supreme Court of the United States

MINGO LOGAN COAL COMPANY,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

M. REED HOPPER
DANIEL A. HIMEBAUGH
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: mrh@pacificlegal.org
E-mail: dah@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Petitioner Mingo Logan Coal Company (Mingo) planned to operate a coal mine in West Virginia. To accomplish this, Mingo was required to obtain a Clean Water Act (CWA) Section 404 "dredge and fill" permit from the United States Army Corps of Engineers (Corps). Mingo received the permit from the Corps in 2007 after spending millions of dollars and almost a decade to complete an exhaustive environmental review process. That review process included consultation with Respondent United States Environmental Protection Agency (EPA), which did not oppose granting the permit to Mingo.

However, two years later—after an intervening presidential election—EPA pressed the Corps to cancel Mingo's permit. The Corps refused because Mingo was in compliance with all permit conditions and no change in circumstances justified cancellation. But when the Corps failed to act as EPA demanded, EPA gave notice that *it* would "veto" the permit, under the purported authority of CWA Section 404(c).

EPA finalized its decision in 2011, almost four years after the Corps granted the permit to Mingo. EPA effectively halted Mingo's mine, because it put Mingo on notice that certain tributaries which had been designated for the discharge of dredged and fill material were no longer going to be available for that purpose.

The question is whether CWA Section 404(c) authorizes EPA to cancel or modify a dredge and fill permit after the Corps has issued it.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Federal Statutes

United States Constitution

Rules of Court

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF AMICUS CURIAE

Pursuant to Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of the Petitioner.[1]

PLF is the nation's most experienced public interest legal organization litigating for vigorous application of the Constitution in the field of environmental law, and has a long history of litigating CWA issues. *E.g., Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326 (2013); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009); *Rapanos v. United States*, 547 U.S. 715 (2006); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Costle v. Pac. Legal Found.*, 445 U.S. 198 (1980); *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 663 F.3d 470 (D.C. Cir. 2011); *Barnum Timber Co. v. EPA*, 633 F.3d 894 (9th Cir. 2011); *Butte Envtl. Council v. U.S. Army Corps of Eng'rs,* 620 F.3d 936 (9th Cir. 2010); *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009).

For the first time in the history of the CWA, a court has authorized the unilateral revocation of a Section 404 permit by EPA, years after permit approval and while the permit holder is in full

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[1] All parties have been given timely notice of PLF's intent to participate in this case as amicus curiae, and all parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court. PLF affirms under Rule 37.6 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 PLF, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

compliance with all permit conditions. That opinion puts all Section 404 permits at risk of cancellation based on bureaucratic caprice. The Corps issues tens of thousands of Section 404 permits every year, some costing millions of dollars, as in this case.[2] But under the court of appeals' ruling, no one can rely on an authorized Section 404 permit for fear it may be cancelled or modified by a sudden change in EPA policy. Such a sweeping power is dangerous because it creates uncertainty among the regulated public, discourages economic development, breeds distrust in government, and is contrary to law and common sense. PLF therefore supports the Petition for Writ of Certiorari.

This brief spotlights constitutional problems that follow from the court of appeals' opinion, which places a destructive permit cancellation power in EPA's hands.

SUMMARY OF REASONS FOR GRANTING THE PETITION

Mingo's Petition for Writ of Certiorari asks the Court to resolve an important dispute about the meaning of CWA Section 404(c)—whether that provision authorizes EPA to cancel or modify dredge and fill permits that have been issued by the Corps. Under EPA's theory, the agency may effectively revoke a duly issued Section 404 permit at any time, regardless of the duration or cost of reliance on the permit, even when a permit holder is in compliance

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[2] Congressional Research Service, Claudia Copeland, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments* 2 (Jan. 30, 2012) (reporting that Corps authorizes more than 74,000 Section 404 activities per year).

with the terms of the permit. There are many constitutional problems with EPA's broad interpretation of its own authority under Section 404(c), an interpretation adopted by the D.C. Circuit Court of Appeals. The lower court's interpretation conflicts with the constitutional presumption against retroactivity, fails to safeguard permit holders' established rights according to due process, creates a culture of political targeting of disfavored dischargers for permit cancellation, and threatens to take permit holders' private property without just compensation. This Court should therefore grant the Petition to determine whether Section 404(c) should be construed to afford EPA unchecked authority, as the court of appeals held.

REASONS FOR GRANTING THE PETITION

This Court applies time-tested rules of statutory interpretation when searching for meaning in a statute. One familiar rule counsels the Court not to construe a statute in a manner that risks constitutional infirmity, if it can be avoided. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 132 S. Ct. 2566, 2593 (2012) (Roberts, C.J.) (citing *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-49 (1830)). As the divergent opinions of the lower courts in this case illustrate, CWA Section 404(c) has been subject to varying, inconsistent interpretations. *Compare Mingo Logan Coal Co. Inc., v. U.S. Envtl. Prot. Agency*, 714 F.3d 608, 609 (D.C. Cir. 2013) (concluding that EPA has "post-permit withdrawal authority"), *with Mingo Logan Coal Co., Inc., v. U.S. Envtl. Prot. Agency*, 850 F. Supp. 2d 133, 134 (D.D.C. 2012) (concluding that "EPA exceeded its authority under Section 404(c) . . . when it

attempted to invalidate an existing permit"). The Court should now resolve the dispute over the meaning of Section 404(c), while paying special attention to the constitutional snares that beset a particular interpretation.

The court of appeals adopted an interpretation of Section 404(c) that conflicts with this Court's opinions on a number of constitutional doctrines.[3] In short, the lower court granted EPA unfettered authority to cancel or modify permits at any time, regardless of the Corps' view of the matter, the permit holder's compliance with the permit, or the permit holder's expectations for the project. That interpretation opens a Pandora's box of constitutional evils.

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[3] The relevant statutory text reads: "The [EPA] Administrator is authorized to prohibit the specification (including the withdrawal of specification) of any defined areas as a disposal site, and he is authorized to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site, whenever he determines, after notice and opportunity for public hearings, that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas. Before making such determination, the Administrator shall consult with the Secretary [of the Army]. The Administrator shall set forth in writing and make public his findings and his reasons for making any determination under this subsection." 33 U.S.C. § 1344(c).

I

EPA'S UNBOUNDED INTERPRETATION OF ITS OWN AUTHORITY UNDER SECTION 404(C) CONFLICTS WITH THE CONSTITUTIONAL PRESUMPTION AGAINST RETROACTIVITY

A. Allowing EPA to Retroactively Interfere with Corps-issued Permits Fails To Protect Permit Holders' Established Rights as a Matter of Due Process

The presumption against retroactivity is a constitutional weak point for the court of appeals' broad reading of Section 404(c). Government decisions that have a retroactive effect are suspect as a matter of due process, because they upset the affected parties' settled expectations and do not protect established rights. *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Courts, therefore, strongly disfavor retroactivity. *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269 (1994); *Claridge Apartments Co. v. Comm'r of Internal Revenue*, 323 U.S. 141, 164 (1944). In fact, this Court's jurisprudence has contained a formal presumption against the constitutionality of retroactive acts since the founding of our nation. *Vartelas v. Holder*, 132 S. Ct. 1479, 1486 (2012) ("The presumption against retroactive legislation . . . 'embodies a legal doctrine centuries older than our Republic.'") (quoting *Landgraf*, 511 U.S. at 265).

To determine if a retroactive act is unconstitutional, courts must examine whether it will "'tak[e] away or impai[r] vested rights acquired under

existing laws, or creat[e] a new obligation, impos[e] a new duty, or attac[h] a new disability, in respect to transactions or considerations already past.'" *Vartelas*, 132 S. Ct. at 1486-87 (quoting *Soc'y for Propagation of Gospel v. Wheeler*, 22 F. Cas. 756, 767 (No. 13,156) (CCNH 1814) (alterations in original)); *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37-38 (2006) (describing application of presumption against retroactivity). Notably, those concerns are "most pressing" in cases like this one, which affect contract or property rights, "'matters in which predictability and stability are of prime importance.'" *Republic of Austria v. Altman*, 541 U.S. 677, 693 (2004) (quoting *Landgraf*, 511 U.S. at 271); *see* Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960) ("[T]he most fundamental reason why retroactive legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences.").

The Court now confronts dueling interpretations of Section 404(c). On one hand, construing Section 404(c) to allow EPA unilaterally to cancel or modify dredge and fill permits at any time—as the court of appeals did—raises serious due process concerns. Section 404 permit applicants establish their expectations for a project and achieve CWA compliance by obtaining a permit from the Corps. 33 U.S.C. § 1344(p). The permit then serves to protect the permit holder from changing rules or third-party lawsuits, thereby safeguarding the project, investment, and the jobs and resources the project will produce. *Coeur Alaska*, 557 U.S. at 281. Yet the court of appeals determined that Section 404(c) authorizes EPA to

cancel or modify a discharge permit "at any time," even years after the permit has issued and the holder has been relying on it to comply with the CWA's prohibition against discharges. *Mingo Logan Coal Co.*, 714 F.3d at 613. The threat of EPA cancellation or modification under the court of appeals' interpretation of Section 404(c) will hang over a project like the Sword of Damocles, even if the permit holder never falls out of compliance with the terms of the permit. And if EPA chooses to let the sword drop and revokes a permit, as it did in this case, that decision would arbitrarily undermine the permit holder's expectations and rights acquired under Section 404, and impose new duties not contemplated in the previously completed permitting process.

On the other hand, Mingo's interpretation of Section 404(c) obviates the retroactivity problem. Mingo argues that EPA serves an auxiliary function under Section 404. *Cf. Coeur Alaska*, 557 U.S. at 273-74 (holding that Corps has primary permitting responsibility under Section 404). EPA may consult on a permit application while the Corps is reviewing it, and EPA may even block a project during the course of the permitting process if it deems the project to be too environmentally harmful. 33 U.S.C. § 1344(c). But Congress designed the CWA so that EPA's Section 404 activity will take place within the context of the greater permitting scheme, in which *the Corps* determines whether a project meets the criteria for approval. 33 U.S.C. § 1344(a). Under Mingo's interpretation of Section 404(c), permit holders may move forward with a project once they have obtained a permit from the Corps—subject to EPA consultation—and may operate under the permit so

long as they continue to abide by its requirements, without threat of EPA cancellation.

Construing Section 404(c) to recognize EPA's supporting role in the permitting process, while retaining the Corps' primacy in the regulatory scheme, avoids the due process problems created by the court of appeals' opinion. Construing Section 404(c) to allow EPA to cancel or modify permits which have been issued by the Corps turns the permitting process on its head, and gives rise to serious due process questions, because it allows EPA to upset permit holders' settled expectations.

B. Allowing EPA to Retroactively Interfere with Corps-issued Permits Creates a Culture of Targeting Politically Unpopular Dischargers

The Court disfavors retroactive acts for the additional reason that retroactivity provides a too-convenient means by which the government can exact retribution against unpopular groups or individuals. *Altman*, 541 U.S. at 693. Such unfair targeting may result in the government infringing on individuals' Fifth Amendment right to equal protection. U.S. Const. amend. V; *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (holding that "'bare . . . desire to harm a politically unpopular group cannot' justify disparate treatment of that group") (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)). Equal protection guarantees that the government may not seek to deprive individuals of rights merely because those individuals are politically

disfavored by the people in power.[4] *See Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (holding that laws creating legal disadvantages born out of animosity for certain classes of persons do not promote any legitimate governmental interest).

The court of appeals' open-ended interpretation of Section 404(c) would allow EPA to cancel or modify individual Corps-authorized Section 404 permits. Some Section 404 dischargers who completed the permitting process under a previous administration may not be tolerable to a subsequent administration, and that may lead to discrimination against unpopular dischargers through the cancellation of previously issued permits. Indeed, this case demonstrates that the court of appeals may have unwittingly endorsed agency action against select dischargers by adopting EPA's broad reading of Section 404(c). The plain fact is that the Corps issued the permit to Mingo in 2007, prior to President Obama taking office; and EPA began the process of modifying Mingo's permit in 2009, during the course of a public campaign by the new

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[4] As some recent, highly publicized events demonstrate, selectively employing the law against individuals for political ends is both unfair to those who are targeted, and destructive to those who do the targeting. *See* Jonathan Weisman, *Management Flaws at I.R.S. Cited in Tea Party Scrutiny*, N.Y. Times, May 14, 2013 (inspector general's report concluded that IRS employees singled out conservative political groups for extra scrutiny under tax laws), *available at* http://www.nytimes.com/2013/05/15/us/politics/report-on-irs-audits-cites-ineffective-management.html?_r=0 (last visited Dec. 9, 2013); Steven Greenhouse, *Labor Board Drops Case Against Boeing After Union Reaches Accord*, N.Y. Times, Dec. 9, 2011 (NLRB forced to drop case after suing Boeing Co. for building airplanes in South Carolina to achieve lower labor costs), *available at* http://www.nytimes.com/2011/12/10.us/business/labor-board-drops-case-against-boeing.html (last visited Dec. 9, 2013).

Obama administration to stop domestic coal production.[5]

In contrast, Mingo's interpretation of Section 404(c) protects all lawful dischargers—whether or not they are politically popular—because it prevents EPA from mounting permit cancellation crusades against a particular class of disdained dischargers or industry. All dischargers should be subject to environmental scrutiny during the permitting process, 33 U.S.C. § 1344(a)-(c), but all dischargers should be protected from capricious efforts to interfere with their projects after they have satisfied the criteria for permit approval. The Court should grant the Petition and embrace Mingo's interpretation of Section 404(c), which promotes fairness for all Section 404 permit applicants.

This case presents important constitutional questions about retroactivity under due process and equal protection principles. The Court should grant the Petition for Writ of Certiorari and make a definitive ruling on the reach of EPA's authority under Section 404(c).

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[5] Thomas L. Casey & David W. Mitchell, *Has EPA's "War on Coal" Stalled?*, Nat. Resources & Envt. 1, Vol. 27, No. 3 (2013) ("Less than six months after President Obama took office, EPA set the tone for its war on coal by signing a Memorandum of Understanding . . . with [the U.S. Department of Interior] and the Corps . . . apparently aimed at halting mountaintop mining operations."); *see* The Hill, *White House adviser: 'War on coal is exactly what's needed'*, June 25, 2013, thehill.com/blogs/e2-wire/e2-wire/307571-white-house-adviser-war-on-coal-is-exactly-whats-needed (last visited Oct. 14, 2013) (quoting presidential energy policy adviser who promotes a "war" on coal production); *see also* Inaugural Address by President Barack Hussein Obama, Jan. 20, 2009 (promising to "harness the sun and the winds" to "roll back the specter of a warming planet").

II

EPA'S UNBOUNDED INTERPRETATION OF ITS OWN AUTHORITY UNDER SECTION 404(C) RISKS TAKING PRIVATE PROPERTY WITHOUT JUST COMPENSATION

Finally, the Court should consider that bestowing limitless permit cancellation authority upon EPA will have significant ramifications under the Fifth Amendment's Takings Clause. U.S. Const. amend. V. The Takings Clause forbids government agencies from taking private property without paying just compensation to the owner. *Id*. A taking may occur as a result of government's regulatory decisions if those decisions deprive an affected property owner of all or a substantial amount of her property value. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). Whether a taking has occurred under the *Penn Central* framework depends on such factors as the property owner's investment-backed expectations, along with the severity of the economic loss. *Penn Central*, 438 U.S. at 124.

Property owners who seek Section 404 permits are usually required to spend large sums of money before they will be allowed to use their property. As the Court noted in *Rapanos*, over a decade ago, the average applicant for an individual permit spent over two years and almost $300,000 to complete the process, not counting the costs of mitigation or design changes. 547 U.S. at 721 (citing David Sunding & David Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the*

Wetland Permitting Process, 42 Nat. Resources J. 59, 74-76 (2002)). Those costs have not abated, and major mining projects may cost much more. The Pebble Partnership, for example, has spent over $150 million to prepare to apply for a permit for its planned copper and gold mine in Alaska.[6]

EPA's broad interpretation of its Section 404(c) authority would allow the agency to bar permit holders from using their property after those owners have spent significant resources to obtain the permit and invest in expensive facility, technology, or infrastructure needs in reliance on the permit, as Mingo did in this case. This would lead to dramatic economic losses, even for an average individual permit holder. *See Rapanos*, 547 U.S. at 721. Moreover, property owners who successfully completed the permitting process will have established investment-backed expectations to use their property in accordance with the terms of their permits. *See* 33 U.S.C. § 1344(p). EPA's unilateral permit cancellation power would destroy those reasonable expectations.

This Court should grant the Petition for Writ of Certiorari and determine whether Congress intended for EPA to risk effecting a regulatory taking whenever it modifies a permit under Section 404(c). That cannot be what Congress had in mind. The Section 404 permitting process was designed to allow property

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[6] *See* Pebble Partnership, *$80 million budget approved for Pebble Project 2013*, corporate.pebblepartnership.com/news-article.php?s=80-million-budget-approved-for-pebble-project-2013 (last visited Oct. 24, 2013); *see generally* Daniel A. Himebaugh, *Can the Environmental Protection Agency Stop the Pebble Mine?* Engage, Vol. 14, Issue 2 (2013) (discussing Pebble mine).

owners to use their property productively and responsibly, not to stifle investment and undermine development expectations after the Corps has approved a project.

CONCLUSION

PLF urges the Court to grant the Petition for Writ of Certiorari. The Court should review this case and adopt an interpretation of CWA Section 404(c) that safeguards the rights of individuals who wish to make use of their property through the Section 404 permitting process.

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Respectfully submitted,

M. REED HOPPER
DANIEL A. HIMEBAUGH
Counsel of Record
Pacific Legal Foundation
10940 NE 33rd Place
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: mrh@pacificlegal.org
E-mail: dah@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation