No. 10-1062

In the

Supreme Court of the United States

CHANTELL SACKETT, et vir,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

EDWIN MEESE III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman Univ. Sch. of Law
One University Drive
Orange, California 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amici Curiae Center for Constitutional Jurisprudence and National Federation of Independent Business Small Business Legal Center

QUESTION PRESENTED

1. Does the Clean Water Act prohibit judicial review of orders issued by the Environmental Protection Agency prohibiting the use of private property, imposing significant costs on property owners, and threatening millions of dollars in civil penalties?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. REVIEW IS NECESSARY TO PRESERVE THE INDIVIDUAL RIGHTS IN PROPERTY RECOGNIZED BY THE DUE PROCESS CLAUSE 4

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Boy Scouts of America v. Dale,
530 U.S. 640 (2000) 1

Elk Grove Unified Sch. Dist. v. Newdow,
542 U.S. 1 (2004) 1

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 1

Jacobellis v. Ohio, 378 U.S. 184 (1964) 5

Mitchell v. W.T. Grant Co.,
416 U.S. 600 (1974) 9

Rapanos v. United States,
547 U.S. 715 (2006) 3-5, 7

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs,
531 U.S. 159 (2001) 1, 15

TVA v. Whitman,
336 F.3d 1236 (11th Cir. 2003) 6

United States v. Morrison,
529 U.S. 598 (2000) 1

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 6-7, 9

Zelman v. Simmons-Harris,
536 U.S. 639 (2002) 1

United States Constitution

U.S. Const. amend. I 5

U.S. Const. amend. V 9, 14

U.S. Const. amend. XIV 9

State Constitution

N.H. Const. pt. 1, art. 2 13

Federal Statutes

33 U.S.C. § 1311 6

33 U.S.C. § 1319 6

33 U.S.C. § 1362 6

Federal Regulation

40 C.F.R. § 230.3 6

Court Rules

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

Adams, John, *Discourses on Davila, in* 6 THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1851) 13

Adams, Willi Paul, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* (1980) 12

Blackstone, William, 1 *Commentaries on the Laws of England* (Univ. of Chicago Press 1979) (1765) 10

Editor, BOSTON GAZETTE, Feb. 22, 1768 9

Ely, James W., Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), *available at* http://www.theahi.org/storage/Is%20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011) 9-10, 14

Ely, James W., Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* (1997) 10-12

Hamilton, Alexander, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett ed., 1973) 13

Joint EPA-Army Corps of Engineers Memorandum, Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* (Dec. 2, 2008) 5

Lee, Arthur, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA (4th ed. 1775) 11

Locke, John, *Two Treatises of Government* (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) 10-11

Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited Mar. 23, 2011) 10

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., Yale Univ. Press rev. ed. 1937) 13

Webster, Noah, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787) 14

Wilson, James, 2 *Collected Works of James Wilson* (Kermit L. Hall & Mark David Hall eds., 2007) 13

IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the individual liberties the Framers sought to protect by adoption of the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies—especially where that power interferes with the fundamental right to own and use property.

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae 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, its members, or its counsel made a monetary contribution to its preparation or submission.

The National Federation of Independent Business (NFIB) is the nation's leading small business advocacy 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 right of its members to own, operate, and grow their businesses. NFIB represents about 350,000 independent business owners who are located throughout the United States. The NFIB Small Business 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 NFIB Legal Center frequently files amicus briefs in cases that will affect small businesses.

NFIB's membership includes ranchers, farmers, homebuilders and many others that would be adversely affected if judicial review were delayed until either the landowner has been denied a permit or is subject to an EPA enforcement action. As an organization that represents only the interests of small business owners, NFIB offers a unique perspective on the deleterious effects of the Ninth Circuit's ruling. Under this decision, landowners who have received a compliance order, that they believe is invalid, can get their day in court only by: (1) spending hundreds of thousands of dollars and years applying for a permit that they contend they do not even need, or (2) inviting the agency to bring an enforcement action for potentially hundreds of thousands of dollars in civil penalties for violations of the order, and criminal penalties for underlying violations of the Act. Either choice is financially

untenable for a small business owner and would adversely affect the business's ability to operate or expand.

SUMMARY OF ARGUMENT

In the nearly five years since this Court's fractured ruling in *Rapanos v. United States*, the Environmental Protection Agency and the Army Corps of Engineers have not promulgated a regulation defining the limits of the jurisdiction under the Clean Water Act. Instead, they have settled on a joint "guidance" document that by its terms is not binding on either agency. Property owners are thus left with a regulatory regime that defines "waters of the United States" no more concretely than "I know it when I see it." Against this backdrop, the Ninth Circuit has ruled that EPA is entitled to issue what amounts to a mandatory injunction to property owners without the need to first prove to a court that the property owner has violated the Clean Water Act or even that the property at issue falls within EPA's jurisdiction under the Act. Further, the Ninth Circuit ruled that the property owners' only opportunity for judicial review of the agency-issued injunction is to risk millions of dollars in fines by ignoring the agency order, or spending a quarter of a million dollars and two years of time in pursuit of a permit from the Army Corps of Engineers. Once the Corps has issued a final determination on the permit application then and only then will the property owner be allowed to have his day in court.

This result effectively deprives individuals and small business owners of the rights to own and to use property. Yet the individual rights in property were

among the core individual liberties that the Framers of the Constitution sought to protect. Review by this Court is necessary to ensure that deprivations of individual rights in property remain protected by the Due Process Clause.

ARGUMENT

I. REVIEW IS NECESSARY TO PRESERVE THE INDIVIDUAL RIGHTS IN PROPERTY RECOGNIZED BY THE DUE PROCESS CLAUSE

> The burden of federal regulation on those who would deposit fill material in locations denominated "waters of the United States" is not trivial. In deciding whether to grant or deny a permit, the U.S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as "economics," "aesthetics," "recreation," and "in general, the needs and welfare of the people," 33 CFR § 320.4(a) (2004). The average applicant for an individual permit spends 788 days and $271,596 in completing the process.

Rapanos v. United States, 547 U.S. 715, 721 (2006) (plurality opinion).

The process is more burdensome for those who have no intent to fill the "waters of the United States" and indeed have no idea that their property may fall within the definition of "waters."

This Court's decision in *Rapanos* produced five separate opinions on what constitutes the "waters of the United States" for purposes of the Clean Water

Act—none of which commanded a majority of the Court. The Chief Justice noted in his separate concurring opinion that the Court would grant substantial deference to EPA and the Army Corps of Engineers if they exercise their rulemaking power to issue regulations defining the terms at issue in the case. *Id.* at 758. In the nearly five years since the *Rapanos* decision was issued, the agencies have declined to issue such a regulation. Instead, they have chosen to issue a "guidance" which they emphasize is not a "regulation" and does not "impose legally binding requirements on EPA, the Corps, or the regulated community, and may not apply to a particular situation depending on the circumstances." Joint EPA-Army Corps of Engineers Memorandum issued on December 2, 2008, entitled "Clean Water Act Jurisdiction following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States*, at 4 n.17.

"Waters of the United States," it would seem, have now reached the status of Justice Stewart's definition of hard core pronography: "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). Justice Stewart and his colleagues were attempting to draw a line of what was protected by the First Amendment and what was not in the context of those who sought to push the boundaries of prior rulings. The Court was struggling to protect the liberties included in the Bill of Rights. Here, however, we are confronted with enforcement officials using their power under the law to compel surrender of private property rights on the basis of an "I know it when I see it" definition. The ambiguity in the definition increases the agency's power at the expense individual liberty. The danger to those fundamental

rights is only heightened by a refusal of the courts to review agency action.

Under the Clean Water Act, a property owner who moves dirt on a portion of his property can be cited for a violation of the Act's prohibition on polluting the "waters of the United States." 33 U.S.C. §§ 1311, 1319, 1362; 40 C.F.R. § 230.3. The Act provides the Administrator with the choice of seeking enforcement of criminal penalties, seeking an injunction, holding an administrative hearing for the purpose of assessing civil penalties, seeking a judicial order for the payment of penalties, or issuing a compliance order. 33 U.S.C. § 1319. According to the court below, only the first four options offer the property owner the opportunity for judicial review of EPA's actions or assertions. As the Ninth Circuit reads the statute, no such review, however, is available for compliance orders.

Compliance orders are not simple orders to "obey the law," but instead operate as mandatory injunctions. *See TVA v. Whitman*, 336 F.3d 1236, 1241 (11th Cir. 2003). In this case, the property owners were ordered to remove the fill dirt placed on the property, replant vegetation, and monitor the property for a period of three years. The compliance order does not state whether the property owners will ever be allowed to use their property for any purpose. For the near term, however, the property owners have been evicted from their own land.

The compliance order requirements displacing the Sacketts from their property distinguishes this case from *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). In that case, this Court dismissed the argument that an agency's mere

exercise of jurisdiction over property would constitute a taking. *Id.* at 127. Here, however, we have something more than a mere permit requirement. The property owners have been ordered off of their property.

In answer to the complaint that there has been no judicial review of this order to vacate their own property, the court below ruled that judicial review could be had if only the Sacketts would apply for a permit to fill the wetlands (whether or not the property is in fact wetlands) from the Army Corps of Engineers. Once that permit was denied, the Sacketts could then challenge the denial and thereby obtain judicial review of EPA's claim that the property at issue falls within the statutory definition of "waters of the United States."

The plurality opinion in *Rapanos* noted the difficulties in pursuing such a permit. On average, it takes a little more than two years to obtain a final decision from the agency and costs more than a quarter of a million dollars. *Rapanos*, 547 U.S. at 719. Even without the delay, the cost outstrips the total value of the vast majority of single family home lots.

The Ninth Circuit interpreted the statute as authorizing the agency to issue its own mandatory injunction (thus rendering meaningless the provisions of the statute authorizing the agency to seek an injunction from the United States District Court). A property owner who wants judicial review of that injunction has two options. First, the owner can ignore the order—daring the agency to bring the action to court in an attempt to enforce its injunction with civil penalties that can range up to $32,500 per

day. Then and only then will the property owner have the opportunity to contest the basis of the order—that placing fill-dirt on the property amounted to the addition of a pollutant to the "waters of the United States." The statute provides that mere violation of the compliance order—separate and apart from violation of the Clean Water Act—is grounds for assessment of the daily penalty. Thus, to obtain judicial review of the mandatory injunction a property owner would need to risk ruinous fines of potentially millions of dollars.[2]

The only other option is to submit to the injunction, vacate the property, and seek a permit from the Army Corps of Engineers. At the conclusion of that two-year process, the property owner could seek review of the agency's determination of whether the property constituted "waters of the United States." In this case, however, we deal with individuals who were seeking to build a home on a residential lot in an area where neighboring properties were already developed. This is not the type of a project that can support a permit process that costs a quarter of a million dollars and takes more than two years to complete. Nonetheless, the Ninth Circuit ruled that this was a sufficient opportunity for judicial review to avoid any violation of the Due Process Clause.

We arrive at this situation because of a steady devaluation of the constitutionally protected individual right to own and use property. Although

---

[2] If a property chose to ignore the compliance order for the time it took to obtain a final determination from the Army Corps of Engineers on a permit, the potential total fine would exceed $25 million.

specifically mentioned in the Takings Clause of the Fifth Amendment and Due Process Clauses of the Fifth and Fourteenth Amendments, individual rights in property have steadily been eroded to the point that no constitutional violation is seen in regulations that require individuals to obtain "permission" to use their property. *Riverside Bayview*, 474 U.S. at 127. Indeed, a delayed hearing is not seen as a problem for purposes of the Due Process Clause where "*only* property rights are involved." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (emphasis added, citation omitted). Those conclusions are only possible if one ignores the original meaning of the protections in the Constitution for the individual right to own and use property.

One of the founding principles of this nation was the view that respect for property is synonymous with personal liberty. In 1768, the editor of the Boston Gazette wrote: "Liberty and Property are not only join'd in common discourse, but are in their own natures so nearly ally'd, that we cannot be said to possess the one without the enjoyment of the other." Editor, BOSTON GAZETTE, Feb. 22, 1768, at 1. This widespread association of liberty and property, particularly fueled by the availability of land, grew from the background and influence of English law and philosophy.

The Magna Carta of 1215 included the first safeguard of rights from infringement by the monarch. James W. Ely, Jr., *Is Property the Cornerstone of Liberty?*, Lecture at Conference on Property Rights at the Alexander Hamilton Institute for the Study of Western Civilization (Apr. 30, 2009), at 1, *available at* http://www.theahi.org/storage/Is%

20Property%20the%20Cornerstone%20of%20Liberty-March%2011.doc (last visited Mar. 23, 2011). Article 39 of the Magna Carta provided, "No freeman shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta, 1215, Article 39, *available at* http://www.constitution.org/eng/magnacar.htm (last visited March 23, 2011). In his 1765 Commentaries on English Law William Blackstone expounded on the application of the Magna Carta and defined private property rights as both sacred and inviolable. It was the "absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." William Blackstone, 1 *Commentaries on the Laws of England* 135 (Univ. of Chicago Press 1979) (1765).

In the late seventeenth century, a wave of English political philosophers responded to the Stuart crowns' trespasses by developing theories of property rights. Ely, Lecture, *supra*, at 2. John Locke, the foremost of these influential thinkers, taught that the right to own private property was natural and in fact preceded the state's political authority. Locke's 1690 *Two Treatises of Government* suggested that rights in property were inseparable from liberty in general, and that the only purpose of government was to protect property and all of its aspects and rights. James W. Ely, Jr., *Property Rights: The Guardian of Every Other Right: A Constitutional History of Property Rights* 17 (1997). "The great and chief end therefore, of Men's uniting into Commonwealths, and putting themselves under Government, is the preservation of Property." John Locke, *Two Treatises of Government*

380 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690).

"Lockean" thinking helped to weaken claims of absolute monarchy in England and profoundly influenced 18th century Whigs. Their political and philosophical posture shifted to stress the rights of property owners as the bulwark of freedom from arbitrary government. Ely, *Property Rights*, *supra*, at 17. Property ownership was identified with the preservation of political liberty.

Whig political thought and Blackstone's commentaries were widely studied and shaped public attitudes in colonial America, where property and liberty were inseparable. The Revolution, prompted by England's constant violation of property and commerce, is evidence of the depth of the Founder's commitment to the belief that rights in property could not be separated from political liberty. As Arthur Lee of Virginia declared in his revolutionary 1775 publication, "The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty". Arthur Lee, *An Appeal to the Justice and Interests of the People of Great Britain*, *in* PRESENT DISPUTE WITH AMERICA 14 (4th ed. 1775).

In 1776, the Declaration of Independence solidified this tie between political liberty and private property. In drafting the Declaration, Thomas Jefferson did not distinguish property from other natural rights, remaining consistent with Whig philosophy and borrowing heavily from John Locke. Ely, *Property Rights*, *supra*, at 17. Locke described the natural rights that government was formed to protect as "life liberty, and estates." Jefferson

substituted "pursuit of happiness" for "estates," but this should not be misunderstood as any de-emphasis of property rights. Instead, the acquisition of property and the pursuit of happiness were so closely transposed that the founding generation found the naming of either one sufficient to invoke both. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era* 193 (1980).

"Liberty and Property" became the first motto of the revolutionary movement. Ely, *Property Rights*, *supra*, at 25. The new Americans emphasized the centrality and importance of the right to property in constitutional thought. Protection of property ownership was integral in formation of the constitutional limits on governmental authority. *Id.* at 26. As English policies continued to threaten colonial economic interests, they strengthened the philosophical link between property ownership and the enjoyment of political liberty in American's eyes. Adams, *supra*, at 193.

The widespread availability of land did not alter the view that rights in property could not be overcome by a simple public desire. Instead, it strengthened the view that property was central to the new American social and political order. *Id.* Early State constitutions explicitly reflected this fundamental principle in their language. New Hampshire's 1783 Constitution was one of four to declare that "All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word,

of seeking and obtaining happiness." N.H. Const. pt. 1, art. 2.

Revolutionary dialogue and publications emphasized the interdependence between liberty and property. In 1795, Alexander Hamilton wrote: "Adieu to the security of property adieu to the security of liberty. Nothing is then safe, all our favorite notions of national and constitutional rights vanish." Alexander Hamilton, *The Defense of the Funding System*, *in* 19 THE PAPERS OF ALEXANDER HAMILTON 47 (Harold C. Syrett ed., 1973). When the delegates to the Philadelphia convention gathered in 1787, they echoed this Lockean philosophy. Delegate John Rutledge of South Carolina, for instance, argued that "Property was certainly the principal object of Society." 1 *The Records of the Federal Convention of 1787* 534 (Max Farrand ed., Yale Univ. Press rev. ed. 1937).

The order in which James Wilson listed the natural rights of individuals in his 1790 writing is telling—property came unapologetically first: "I am first to show, that a man has a natural right to his property, to his character, to liberty, and to safety." James Wilson, 2 *Collected Works of James Wilson* ch. 12 (Kermit L. Hall & Mark David Hall eds., 2007). Also in 1790, John Adams proclaimed "Property must be secured, or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1851).

In the minds of the Founders, property ownership was so closely associated with liberty that property rights were considered indispensible. The language of the Bill of Rights sharply underscores

the Founders' understanding of the close tie between property rights and other personal liberties. It is of great significance that the Fifth Amendment contains key provisions safeguarding property as well as key procedural protections protecting other individual rights. This arrangement shows that the drafters saw no real distinction between individual liberty and property rights. Ely, Lecture, *supra*, at 5.

The founding generation believed that all that which liberty encompassed was described and protected by their property rights. Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* 58-61 (Oct. 10, 1787). From the beginnings of our country, and always in the minds of the Founders, these rights stood or fell together. Ely, Lecture, *supra*, at 5.

These rights and values were enshrined in the Constitution—the Due Process Clause specifically forbids a deprivation of property without "due process of law." As a practical matter, however, the Ninth Circuit has authorized in this case what amounts to a permanent deprivation of property with no opportunity for judicial review. Review by this Court is necessary to preserve the Due Process protections for individual rights in property.

CONCLUSION

EPA is undoubtedly pursuing a program that it believes to be socially beneficial. In that pursuit,

EPA and the Corps have consistently pushed the limits of their authority to regulate private property. *See Solid Waste Agency of N. Cook County*, 531 U.S. at 171-72. The uncertain definition of "waters of the United States" is now coupled with an unreviewable power to issue mandatory injunctions. Congress could not have intended such a result and the constitutional protection of the individual liberties to own and use property cannot tolerate such unreviewable power. Amici urge the Court to grant the petition for writ of certiorari.

DATED: March, 2011.

Respectfully submitted,

EDWIN MEESE III
214 Mass. Ave. NE
Washington, DC 20002

JOHN EASTMAN
ANTHONY T. CASO
Counsel of Record
KAREN J. LUGO
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
Telephone: (714) 628-2530
E-Mail: caso@chapman.edu

Counsel for Amici Curiae Center for Constitutional Jurisprudence and National Federation of Independent Business Small Business Legal Center