No. 10-1062

In The
Supreme Court of the United States

CHANTELL SACKETT, et vir,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect the rights of individuals to own and enjoy their property, both because an individual's control over his or her property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. The ability of the government to interfere with private property without adequate process gravely threatens individual liberty. For this reason, IJ both litigates property rights cases that defend the property rights of individuals and files *amicus curiae* briefs in important cases, including *Alvarez v. Smith*, 130 S. Ct. 576 (2009), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). If other governmental agencies were to adopt an enforcement mechanism like that used by the Environmental Protection Agency in this case, the constitutional guarantee of due process under the law would be

[1] Counsel for the parties in this case did not author this brief in whole or in part. The counsels of record for each party received timely notice of intent to file this *amicus curiae* brief and gave their consent. Letters memorializing such consent have been filed with the clerk. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

severely harmed and the ability to own and use private property would be subject to the unrestrained and unreviewed orders of government officials. IJ therefore has an interest in the development of a rule of law that recognizes the importance of private property in our constitutional scheme and helps protect such property by providing speedy, adequate and timely judicial review of governmental action that deprives a landowner of the use and enjoyment of her property.

SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fifth Amendment protects private property by guaranteeing a fair and timely review when the government deprives the owner of the use and enjoyment of her property. Indeed, the concept of "due process" grew out of conditions on the government's ability to seize property contained in the *Magna Carta*. Thus, from the very beginning of the Anglo-American legal tradition, the protection of private property has required pre-deprivation process.

In the Clean Water Act (CWA or the "Act"), Congress has granted the Environmental Protection Agency (EPA) the ability to unilaterally deprive a property owner of his or her rights without providing meaningful review at a meaningful time. Under the Act, an "Administrative Compliance Order" imposes significant and unavoidable harm to the property

owner's right to use and enjoy his or her property. Because these orders are unilateral and unreviewable except at some point in the distant future, they are susceptible to extreme abuse. The Administrative Compliance Order mechanism thus strikes at the very heart of what the Due Process Clause was supposed to prevent – arbitrary governmental action that deprives a property owner of his interests in property without the owner ever having an adequate opportunity to defend himself.

The government has nonetheless sought to avoid judicial review of such orders by calling them "pre-enforcement." An Administrative Compliance Order is not pre-enforcement, however; it is active enforcement. An Administrative Compliance Order mechanism is a command by the government that results in immediate, severe and significant financial harm to a property owner. An Administrative Compliance Order thus acts as a cudgel by which the EPA can coerce a property owner into doing exactly what the government wants. A system where the government orders a citizen to do something and provides only burdensome alternatives to compliance with no possibility of judicial review for years is not due process and has no place in our constitutional order. The decision of the U.S. Court of Appeals for the Ninth Circuit should therefore be reversed.

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ARGUMENT

I. DUE PROCESS PROTECTS PRIVATE PROPERTY AND ANY MECHANISM THAT DEPRIVES A PROPERTY OWNER OF HIS OR HER PROPERTY MUST BE SUBJECT TO MEANINGFUL REVIEW AT A MEANINGFUL TIME

A. The Concept Of "Due Process" Is Grounded In The Notion That There Must Be An Adequate Opportunity For A Property Owner To Be Heard Before The Government Deprives Him Of His Property

"It is now the settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting); *see also Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (due process represents "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

It is beyond dispute that protecting property by requiring adequate process is "deeply embedded in the traditions and feelings of our people." For this reason, this Court has "ensur[ed] that no person will be deprived of his interests in the absence of a

proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). And the "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Administrative Compliance Orders fail this test.[2] The general modern rule is "due process requires an opportunity for a hearing *before* a deprivation of property takes effect." *Fuentes v. Shevin*, 407 U.S. 67, 88 (1972) (emphasis added).

By guaranteeing due process, the Fifth Amendment protects an individual's private property from the arbitrary use of government power. Indeed, the requirement of adequate process has been the indispensible mechanism by which Anglo-American law has protected private property against government encroachment. In the *Magna Carta*, the English barons restrained King John's ability to deprive them of property not by forbidding the Crown from seizing property, but by requiring that the barons first be

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[2] In this brief, *amicus curiae* assumes for the sake of argument that the Ninth Circuit was correct when it concluded that, in the CWA, Congress foreclosed review of Administrative Compliance Orders under the Administrative Procedure Act (APA). For the reasons stated in Petitioners' Brief, however, IJ concurs with Petitioners that review of such orders is available under the APA and that the availability of such review mitigates the due process problems such orders create. *See* Pet'rs' Br. 32-50.

provided adequate process before the Crown could act. Thus, in Chapter 39 of the *Magna Carta*, the barons conditioned the circumstances under which the Crown could strip them of their property: "No free man shall be . . . stripped of his rights or possessions . . . except by the lawful judgement of his equals or by the law of the land." *Magna Carta*, ch. 39.[3] The *Magna Carta* thus linked the provision of adequate process to the underlying rights the barons wished to protect: "The main point in this plan, the chief grievance to be redressed, was the King's practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*." C.H. McIlwain, *Due Process of Law in* Magna Carta, 14 Colum. L. Rev. 27, 41 (1914).[4]

As English law developed, the link between process and property solidified. Parliament codified

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[3] This translation of the *Magna Carta* is available at the Fordham University Internet History Sourcebook Project webpage, http://www.fordham.edu/halsall/source/magnacarta.asp (*last visited* September 29, 2011).

[4] There is some dispute over whether the phrases "law of the land" and "due process" are synonymous, but it is well-established that the use of the term "law of the land" represented an effort to reassert customary law, including procedural protections, in the place of arbitrary royal command. James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Commentary 315, 320 (1999). *See also* Bernard Siegan, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 6-28 (2001).

the *Magna Carta* when it passed the so-called "six statutes" interpreting Chapter 39 in 1354. The third statute declared: "'Item, That no man of what estate or condition that he be shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.'" Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis. L. Rev. 941, 954 (1990) (quoting 28 Edw. 3, ch. 3 (1354)). Lord Coke also recognized that the *Magna Carta* was aimed at protecting property and other underlying rights by requiring an adequate process before the government could act. *See* Sir Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND, PART II 45-46 (1641) ("No man shall be disseised, that is, put out of seison, or dispossessed of his free-hold (that is) lands, or livelihood, or of his liberties, or free customes, that is, of such franchises, and free-domes, and free-customes, as belong to him by his free birth-right, unlesse it be by the lawfull judgement, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and processe of law.").[5]

Roscoe Pound (in a discussion particularly relevant to the Sacketts' predicament) noted the influence Lord Coke's reading of the *Magna Carta* had on

[5] Lord Coke referred to Chapter 39 as Chapter 29, which was the corresponding chapter of the *Magna Carta* when it was reissued in 1225 and subsequently enacted by Parliament. Riggs, 1990 Wis. L. Rev. at 958.

American constitutional law, particularly those portions of the *Institutes* where Lord Coke "considers the necessity of giving one whose rights are to be affected by official action a full and fair opportunity to meet the case against him – something we have been forgetting in much summary administrative action nowadays." Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 49 (1957). The Founders thus accepted the English view that procedural requirements were a vital weapon against tyranny. This view arose not only from the influence of Lord Coke, but Sir William Blackstone's writings as well. *See* Charles A. Miller, *The Forest of Due Process of Law, in* DUE PROCESS 3, 7 (J. Roland Pennock & John W. Chapman, eds., (1977)) (quoting Blackstone's classification of property as "'the third absolute right, inherent in every Englishman . . . of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'"). As James Madison stated, "That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty, is violated by arbitrary seizures of one class of citizens for the service of the rest. A magistrate issuing his warrants to a press gang, would be in his proper functions in Turkey or Indostan, under appellations proverbial of the most compleat despotism." James Madison, *Property*, *in* JAMES MADISON: WRITINGS 515, 516 (Jack N. Rakove ed., 1999). The prevalence of this approach at the time

of the country's founding is reflected in the writings of the Founders, the Due Process Clause itself, and the Northwest Ordinance, adopted in 1787, which provided: "No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land. . . ." Northwest Ordinance (1787), *reproduced in* 1 Melvin I. Urofsky & Paul Finkelman, DOCUMENTS OF AMERICAN CONSTITUTIONAL AND LEGAL HISTORY 78 (2d ed. 2002).

Thus, since 1215, Anglo-American law has prevented the government from interfering with property without first providing access to a "lawful judge or his equals or by the law of the land," by a "lawfull judgement," or "due course, and processe of law." The principle and language are ancient but still relevant. "However quaint some of these ancient authorities of our law may sound to our ears, the Twentieth Century has not so far progressed as to outmode their reasoning. We should not be less humane than were Englishmen in the centuries that preceded this Republic." *Solesbee*, 339 U.S. at 19 (Frankfurter, J., dissenting).

B. Administrative Compliance Orders Deprive Property Owners Of Valuable Rights And Are Susceptible To Extreme Abuse

The question then is whether Administrative Compliance Orders deprive a property owner of the use and enjoyment of his property without the property owner having had access to the "due course, and processe of law"? The answer is clearly "yes." Administrative Compliance Orders thus violate more than

the Due Process Clause of the Fifth Amendment; they are repugnant to eight centuries of Anglo-American legal tradition.

As Petitioners have demonstrated, Administrative Compliance Orders deprive property owners of valuable property rights. The order here turns the Sacketts' property into a nature preserve and forbids them from excluding federal officials from their property. Pet'rs' Br. 17-18. The only other choice available to them is to risk crippling civil, and perhaps criminal, sanctions when all they want is a court to review the Administrative Compliance Order to determine whether the EPA legally issued it.

Moreover, the need for judicial oversight of Administrative Compliance Orders is especially urgent because the potential for abuse inherent in such orders is very high. For instance, under the Act, the EPA Administrator may issue an Administrative Compliance Order "on the basis of any information available to him" indicating that a person is violating the Act. App. A-5. The Administrator's decision can apparently be made in secret and only with the possibility of judicial review years in the future. Pet'rs' Br. 22. Under the Act, there is no mechanism to immediately determine whether the "any information" relied upon by the Administrator is accurate. There is no mechanism to determine whether such information even exists. Nor is there is any mechanism to determine whether the Administrator is acting for the public's good or for some private interest. *Cf. Jerrico*, 446 U.S. at 242 (a prosecutor with a financial or private interest in the outcome of a proceeding

violates due process). And there is no mechanism by which a property owner may inquire into the motivations, interests, or intent of the Administrator.

Finally, there is no mechanism to determine whether the Administrator is simply making a mistake. The Due Process Clause is directly concerned with avoiding mistaken or unjustified deprivations of rights. *See id*. A mechanism that presents a property owner with a range of bad choices, but deprives her of the ability to demonstrate that the government is acting erroneously, in bad faith, or arbitrarily does not comport with due process.

Of course, it does not matter whether the EPA is correct and the agency is ultimately able to demonstrate that the Sacketts did, in fact, violate the Act. The Due Process Clause requires that the Sacketts be provided adequate process before that decision can deprive them of valuable property rights. *See Brody v. Village of Port Chester*, 345 F.3d 103, 112 (2d Cir. 2003) ("In a procedural due process challenge, the question before the court is whether the process affording the plaintiff an opportunity to participate in governmental decision-making before being deprived of his liberty or property was accurate, not whether the government's decision to deprive the plaintiff of such liberty or property was ultimately correct.") (opinion of Sotomayor, J.). The point here is that adequate process is necessary because the risk that the EPA's decision may be wrong goes up substantially when a property owner is unable to challenge the basis for that decision. The risk of error or abuse

is even more acute in this case, where the Sacketts claim that the EPA does not even have jurisdiction over their property in the first place.

In short, when it created Administrative Compliance Orders, Congress created a mechanism by which the EPA, for any reason whatsoever, can order property owners to either comply with the government's restrictions on their property or suffer staggering financial losses, all without the property owner having timely access to an impartial judiciary. King John himself could not have designed a more oppressive or abusive system to bend his subjects to his will. This is not "just government," and it is not due process. The Ninth Circuit should therefore be reversed.

II. ADMINISTRATIVE COMPLIANCE ORDERS ARE NOT "PRE-ENFORCEMENT" BUT ARE GOVERNMENTAL ORDERS SUBJECT TO JUDICIAL REVIEW

The Ninth Circuit below, like other circuits, characterized Administrative Compliance Orders as "pre-enforcement" agency actions without legal consequence and therefore unripe for review. This is incorrect.

In fact, Administrative Compliance Orders are legal determinations by the EPA ripe for judicial review. The orders carry the status of law, command immediate action from property owners, and both impose and threaten severe consequences for noncompliance. The status of such orders as "active

enforcement" is demonstrated by the Act itself, the wording of the orders, and the EPA's treatment of them.

The Act states that "any person who violates any [Administrative Compliance Order] issued by the Administrator . . . shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. § 1319(d). The language of the Act is not tentative, ambiguous or conditional; it does not say "may" or "only after efforts to mitigate any damage have failed." It says that if you violate an Administrative Compliance Order, you "shall" be subject to a penalty. Moreover, the Act clearly indicates that a property owner will be liable if he violates the Administrative Compliance Order, regardless of whether he actually violated the Act in the first place. As the Eleventh Circuit held in examining a similar provision of the Clean Air Act (CAA), this language "undeniably authorize[s] the imposition of severe civil and criminal penalties based solely upon noncompliance with an [Administrative Compliance Order]." *TVA v. Whitman*, 336 F.3d 1236, 1255 (11th Cir. 2003). A government order does not lack legal consequence when defying it results in civil and criminal penalties.[6]

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[6] The Ninth Circuit noted that if the Act is read literally to make violations of Administrative Compliance Orders alone the basis for liability, then such orders "could indeed create a due process problem." App. A-10. It therefore "interpreted" the Act to require that civil and criminal penalties be dependent on whether or not there was an underlying violation of the Act.

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The language the EPA uses in its Administrative Compliance Orders also demonstrates that they are not merely suggestions from the government. They command the property owner to comply with various statutory requirements within a specific timeline with mandatory language and the patina of a judicial order. For instance, the revised Administrative Compliance Order at issue in this case contains "FINDINGS AND CONCLUSIONS" and styles itself an "ORDER issued pursuant to the authority vested in the Administrator of the Environmental Protection Agency." App. G-1. The "ORDER" section of the Administrative Compliance Order uses the words "shall" or "must" at least eleven times. App. G-4-G-6. It references the "requirements of this Order." App. G-5. It states it becomes "effective on the date it is signed." App. G-6. Again, there is no indication that the commands contained in the document are tentative, preliminary or without binding legal effect.

However, this is not an "interpretation" or "construction" of the statute; it is a rewriting of it. As the Eleventh Circuit correctly found, "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F.3d at 1255. Even assuming that Congress did not really mean what it said and Administrative Compliance Orders are simply toothless suggestions from government officials, those orders nonetheless do irreparable harm to regulated parties. No regulated party could reasonably rely on an interpretation of the CWA that so clearly departs from its plain language at the risk of crushing fines and criminal penalties for willful violations.

In that regard, if Administrative Compliance Orders are mere notices of general policy with little to no legal effect, a delay of judicial review would not have the severe consequences the Sacketts face here. *See, e.g.*, *United States v. L.A. and Salt Lake R.R. Co.*, 273 U.S. 299, 309-10 (1927) ("The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation."). In fact, however, an Administrative Compliance Order is not a generalized notice but a specific command that asserts jurisdiction over the Sacketts' property and threatens penalties unless they take specific, burdensome actions by specified dates.

Finally, the EPA itself treats Administrative Compliance Orders as active enforcement of the Act, even though the federal government has a history of treating Administrative Compliance Orders differently depending on whether they are standing in front of a judge or in front of a property owner. Before the courts, the government has argued Administrative Compliance Orders are simply a way to encourage a property owner to pay attention to a potential problem. Before the property owner, however, Administrative Compliance Orders are, as their name tells

us, orders. They are a command from the government to do as you are told. This approach allows the government to achieve its enforcement goals without the delay or oversight attendant to judicial review: "Why does the EPA stake out a position in court that differs from the position it takes when it issues an ACO to a regulated party? One possibility is that the EPA likes to have its cake and eat it too – employing the harsh provisions of the CAA when confronting a potentially recalcitrant party, but hesitant to reveal the legal significance of [Administrative Compliance Orders] in court for fear that the very part of the CAA that makes [Administrative Compliance Orders] so effective will be struck down." *TVA,* 336 F.3d at 1251 n. 26. The fact that a federal agency has in the past so cavalierly treated its responsibilities to both the courts and the people that it purports to serve demonstrates that Administrative Compliance Orders issued by that agency should be subject to judicial review as early in the process as possible.

This conclusion is also consistent with this Court's precedents. This Court considered a similar governmental effort to compel compliance in *Abbott Laboratories v. Gardener*, 387 U.S. 136 (1967). In that case, a drug manufacturer was faced with a ruling from the FDA that determined that it was required by statute to replace the labels on its products. The company could "[e]ither . . . comply with the . . . requirement and incur the costs of changing over their promotional material and labeling or . . . follow their present course and risk prosecution." *Id.* at 152

(quotation marks omitted). The order gave them a choice between "immediate compliance," which required time consuming and expensive changes in conduct and disobeying the order as an "alternative to compliance . . . [which was] even more costly." *Id*. at 152-53. This Court held that this coercive ruling was subject to immediate judicial review and the Court should follow that precedent here. *Id.*

Finally, the Ninth Circuit's view that receipt of an Administrative Compliance Order forecloses judicial review would create the absurd result where a property owner could challenge the EPA's *threatened* enforcement of the Act, but could not challenge the agency's *actual* enforcement of it. This Court has, of course, long recognized that "where threatened action by the *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). Here, the government has carried out its threat of enforcement, but the very application of the law purportedly forecloses judicial review. If the Ninth Circuit is affirmed, this will do little but encourage property owners to preemptively sue the EPA when there is any possibility that the CWA may apply to a property so that property owners can preserve their ability to obtain timely judicial review. The better approach would be to recognize that Administrative Compliance Orders are final agency action subject to judicial review.

This Court should therefore reject the path taken by the lower courts to avoid the clear import of Administrative Compliance Orders by dismissing them as "pre-enforcement" actions with no legal consequences. "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder*, 291 U.S. at 114. Calling an Administrative Compliance Order a "pre-enforcement" mechanism does not make it so. It is essential that this Court foreclose the ability of governmental agencies to avoid judicial review of agency action by simply slapping a "pre-enforcement" label on its activities when the agency is clearly engaging in active enforcement. Permitting such a dangerous end run around the Due Process Clause would remove essential protections from property owners across the country.

CONCLUSION

Administrative Compliance Orders violate the Due Process Clause of the Fifth Amendment as well as eight centuries of Anglo-American legal tradition by depriving property owners of the use of their property without access to meaningful review. They are an active form of enforcement that the Due Process Clause requires be subject to meaningful judicial

review at a meaningful time. The Ninth Circuit should therefore be reversed.

Respectfully submitted,

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