No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Chantell and Michael Sackett own a small lot in a built-out residential subdivision that they graded to build a home. Thereafter, the Sacketts received an Administrative Compliance Order from the Environmental Protection Agency claiming that they filled a jurisdictional wetland without a federal permit in violation of the Clean Water Act. At great cost, and under threat of civil fines of tens of thousands of dollars per day, as well as possible criminal penalties, the Sacketts were ordered to remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years. The Sacketts were provided no evidentiary hearing or opportunity to contest the order. And, the lower courts have refused to address the Sacketts' claim that the lot is not subject to federal jurisdiction.

Do Petitioners have a right to judicial review of an Administrative Compliance Order issued without hearing or any proof of violation under Section 309(a)(3) of the Clean Water Act?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Chantell and Michael Sackett respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The panel opinion of the Court of Appeals is published at 622 F.3d 1139 (9th Cir. 2010), and included in Petitioners' Appendix (Pet. App.) at A. The panel opinion denying the petition for rehearing *en banc* is not published but is included in Pet. App. at D. The opinion of the district court granting the motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) of Respondents United States Environmental Protection Agency, *et al.* (EPA), is not published but is included in Pet. App. at C.

JURISDICTION

On August 7, 2008, the district court granted EPA's motion to dismiss the Sacketts' action and entered judgment in favor of EPA. The Sacketts filed a timely appeal to the Ninth Circuit Court of Appeals. On September 17, 2010, a panel of the Court of Appeals affirmed the district court's dismissal. The Sacketts then filed a timely petition for rehearing *en banc*. On November 29, 2010, the panel denied the

[1] Pursuant to Supreme Court Rule 35.3, Ms. Jackson has been substituted for Stephen L. Johnson as Administrator of the United States Environmental Protection Agency.

petition, no judge of the Court of Appeals having requested a vote. *See* Fed. R. App. P. 35(f). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. V.

The Clean Water Act provides in pertinent part:

> Except as in compliance with this section and sections [1312, 1316, 1317, 1328, 1342, and 1344 of this title], the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a).

The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source.

33 U.S.C. § 1362(12)(A).

> The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(7).

> Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section [1311 of this title], . . . he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

33 U.S.C. § 1319(a)(3).

> Any person who violates . . . any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

33 U.S.C. § 1319(d).

INTRODUCTION

The issue raised by this petition is whether basic principles of due process entitle a landowner who

receives a compliance order from EPA pursuant to the Clean Water Act (CWA) to immediate judicial review of that order. The Ninth Circuit's decision holding that judicial review is unavailable foists an intolerable choice on landowners. According to the decision, landowners who have received a compliance order, and who believe that the compliance order 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. Further, the Ninth Circuit's decision squarely conflicts with the decision of the Eleventh Circuit Court of Appeals in *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). For these reasons, more fully explained below, the petition for writ of certiorari should be granted.

STATEMENT OF THE CASE

The Sacketts own an approximately half-acre parcel of land near Priest Lake, Idaho, which they bought for the purpose of building a house. Pet. App. A-2. The lot exists within a built-out area near the Lake. *See* Pet. App. E-2. The lot's north side is bordered by a road, on the other side of which is a ditch. Pet. App. E-2 - E-3. The lot itself has an existing sewer hookup, and is zoned for residential construction. *See* Pet. App. E-2. Prior to their purchase, the Sacketts completed the normal round of

due diligence inspections. None of their research indicated any CWA permitting history or requirements for the property. *See id.* In short, the Sacketts had absolutely no fair reason to believe that their property was regulable under the CWA.

The Sacketts began some earthmoving work with all local building permits in hand. Shortly thereafter, EPA sent the Sacketts a compliance order under the CWA asserting that their property is subject to the CWA, and that they had illegally placed fill material into jurisdictional wetlands on their land. *Cf.* Pet. App. G.[2] The compliance order functions as an injunction that has both prohibitive and mandatory features. As originally issued, it prohibited the Sacketts from pursuing construction of their home on their property, as previously authorized by local authorities. And, it required the Sacketts immediately to begin substantial and costly restoration work, including removal of the fill material, replanting, and a three-year monitoring program during which the property must be left untouched.[3] *See* Pet. App. G-4 - G-5; H-3. Further, the compliance order subjected the Sacketts to significant civil penalties for failure to

[2] The original compliance order was issued in November, 2007. The order included in Petitioners' Appendix reflects subsequent amendments made by EPA to the original order's schedule for restoration work. *See infra* nn.3-4.

[3] Although the amended compliance order, unlike the original order, does not expressly contemplate a three-year monitoring regime, the amended order nevertheless requires the Sacketts to "restore" the property to its pre-disturbance condition. Pet. App. G-4 - G-6. The Sacketts therefore have every reason to believe that such restoration will not be deemed accomplished by EPA without such a monitoring period. *Cf.* Pet. App. H-3.

abide by its dictates without providing the Sacketts an opportunity to be heard and to contest EPA's findings. *See* Pet. App. G-7.

Believing that their property was not a wetland within the jurisdiction of the United States, the Sacketts requested a hearing to test EPA's jurisdiction over their property; EPA ignored their request. Pet. App. A-3. The Sacketts then filed suit demanding an opportunity to contest the jurisdictional bases for the compliance order.[4] The district court dismissed the suit. *Id.* at C-7. The Sacketts then appealed to the Ninth Circuit.

The panel affirmed the district court's dismissal. The panel decision comprises a three-part analysis. First, the panel analyzed whether the CWA authorizes review of compliance orders. The court acknowledged the general presumption in favor of judicial review of administrative action, but noted that the presumption is overcome " 'whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.' " Pet. App. A-6 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984))). The panel observed that the other courts to have addressed the issue have uniformly held that the CWA precludes review of "pre-enforcement" actions, such as compliance orders. Pet. App. A-6. The panel found those cases persuasive, while relying for support for its conclusion of no "pre-enforcement judicial review" on

[4] During the pendency of the action in the district court, the Sacketts received amendments to the compliance order, each postponing the due date for the Sacketts to remove the fill and to complete the replanting during the growing season. *See* Pet. App. F-1, H-1, I-1.

the CWA's statutory structure, purposes, and legislative history. *See* Pet. App. A-6 - A-9.

Second, the panel analyzed whether preclusion of pre-enforcement judicial review of compliance orders violates the Sacketts' due process rights. The Sacketts had argued that the CWA on its face purports to allow EPA to enforce a compliance order against a landowner even if there is no jurisdictional basis for the order in the first place. In other words, the Sacketts argued that the CWA attempts to authorize civil liability for violations of compliance orders, regardless of whether the CWA itself has been violated. The court acknowledged that this reading of Section 309(a)(3), adopted by the Eleventh Circuit in *TVA v. Whitman* for an analogous provision of the Clean Air Act, would mean that compliance orders are unconstitutional if they are not subject to judicial review. *See* Pet. App. A-10 - A-11. But the court declined to interpret Section 309(a)(3) according to its plain meaning, instead holding that, if and when EPA chooses to enforce a compliance order in federal court, a landowner may at that time raise a jurisdictional defense. Pet. App. A-11 - A-12.

Third, the panel held that mere delay in judicial review of compliance orders does not "create a 'constitutionally intolerable choice' " which violates a landowner's due process rights. Pet. App. A-13 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994))). A landowner who contests EPA's jurisdiction to issue a compliance order can apply for a permit and seek judicial review of the permit's denial. Pet. App. A-13 - A-14. Further, if and when EPA seeks civil penalties for violation of a compliance order, the

amount of those penalties is left to the equitable discretion of a court, not EPA. Pet. App. A-14 - A-15.

Thus, the panel's decision leaves property owners like the Sacketts in an impossible situation: either go through with the permit process that you believe is completely unnecessary and spend more money than your property is worth to "purchase" your chance at your day in court; or invite an enforcement action by EPA that may give you your day in court but only at the price of ruinous civil penalties and, depending on EPA's ire, criminal sanctions for underlying violations of the CWA. Such a regime as countenanced by the Ninth Circuit would be unconstitutional. For the reasons that follow, review in this Court is merited.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED BECAUSE THE RULE ADOPTED BY THE NINTH CIRCUIT AND SEVERAL OTHER CIRCUITS WILL HAVE A SIGNIFICANT NATIONWIDE IMPACT

The Ninth Circuit's decision holds that the CWA compliance order regime does not violate landowners' due process rights, even though that regime effectively eliminates any meaningful opportunity for judicial review. The rule that the Ninth Circuit has adopted is consistent with that of four circuits which have already

held against judicial review in these circumstances.[5] For this reason, the rule is functionally nationwide in scope. But the decision below is significant just within the Ninth Circuit, whose jurisdiction covers over 500 million acres. According to the rule adopted below and by four other circuits, a landowner who receives a compliance order and believes that his property is not subject to EPA jurisdiction has two constitutionally "adequate" avenues open to him. One, he can ignore the compliance order at great financial and legal peril to himself and invite EPA to bring an enforcement action against him in court. Two, he can apply for a permit, spending hundreds of thousands of dollars and years in the process, have it denied, then sue over the denial, and perhaps ultimately win, but never be able to recoup the money that he has spent in the process. Neither of these ostensible "options" is constitutionally tolerable.

Although delay in judicial review does not necessarily violate due process, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. at 216 (due process not offended if "neither compliance with, nor continued violation of, the statute will subject petitioner to a serious prehearing deprivation"), deferring judicial review to some undefined point in the future is unconstitutional if "the practical effect of coercive penalties for noncompliance [is] to foreclose all access to the courts," where "compliance is sufficiently onerous and coercive penalties sufficiently potent." *Id.*

[5] *See Laguna Gatuna, Inc. v. Browner*, 58 F.3d 564 (10th Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996); *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994); *S. Pines Assocs. v. United States*, 912 F.2d 713 (4th Cir. 1990); *Hoffman Group, Inc. v. EPA*, 902 F.2d 567 (7th Cir. 1990).

at 218. As this Court observed in *Ex parte Young*, 209 U.S. 123 (1908), requiring "a party interested 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 effectively "close up all approaches to the courts." *Id.* at 148.[6]

Ignoring the compliance order is no option, for several reasons. First, the CWA imposes significant civil penalties for violating compliance orders. *See* 33 U.S.C. § 1319(d) (imposing maximum civil penalty of $25,000 per day per violation).[7] Just one month of noncompliance puts the landowner at risk of civil liability of **$750,000**. A year's worth of noncompliance puts the liability at **$9,000,000**. Moreover, a landowner who continues with his construction project in the face of a compliance order greatly increases the risk that the agency will seek criminal penalties against him. *See id.* § 1319(c)(1)-(2) (imposing criminal

[6] *See also Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 102 (1901) ("But when the legislature, in an effort to prevent any inquiry of the validity of a particular statute, so burdens any challenge thereof in the courts, that the party affected is necessarily constrained to submit rather than take the chances of the penalties imposed, then it becomes a serious question whether the party is not deprived of [his constitutional liberties].").

[7] The CWA authorizes civil fines of up to $32,500 per day for violations of the Act, *see* Pet. App. F-2, and, as noted in the text, $25,000 per day for violations of a compliance order, 33 U.S.C. § 1319(d). The Act also authorizes administrative penalties, assessed by EPA directly in an administrative proceeding, of up to $125,000 total. *See id.* § 1319(g)(2)(A)-(B).

penalties for negligent and knowing violations of the Act).[8]

Contrary to the Ninth Circuit's decision, the assurance of judicial review for any CWA penalties gives cold comfort to landowners. There is no guarantee that a court will approve a *de minimis* fine or penalty, especially in light of the already very high ceilings that the Act authorizes. Given the potential for significant civil penalties (and criminal penalties for violations of the CWA itself), the "option" to pursue judicial review by violating the compliance order, or the Act, or both, is really no option at all.[9] *Cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007) ("Given this genuine threat of enforcement, we

[8] The CWA authorizes: (i) fines of up to $25,000 per day and imprisonment for one year for first time negligent violations of the Act, 33 U.S.C. § 1319(c)(1); (ii) fines of up to $50,000 per day and imprisonment for two years for repeated negligent violations, *id.*; (iii) fines of up to $50,000 per day and imprisonment for three years for knowing violations, *id.* § 1319(c)(2); and (iv) fines of up to $100,000 per day and imprisonment for six years for repeated knowing violations, *id.*

[9] It is noteworthy that EPA claims a power to prohibit and require action by an injunction-like compliance order (without notice and a prompt hearing) that even the federal judiciary does not enjoy. *See Granny Goose Foods v. Bhd. of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 438-39 (1974) ("The stringent restrictions imposed by . . . Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.") (footnote & citation omitted).

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."); Andrew I. Davis, *Judicial Review of Environmental Compliance Orders*, 24 Envtl. L. 189, 223 (1994) ("The absence of direct review of compliance orders effectively coerces a recipient to comply with the order under threat of mounting penalties during the period prior to EPA enforcement."); 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) ("Certain [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.").

Applying for a permit is no help to landowners either, for two reasons. First, in many instances the agencies will not entertain a permit application until the compliance order has been resolved. *See, e.g.*, 33 C.F.R. § 326.3(e)(1)(ii) ("No permit application will be accepted in connection with a violation where the district engineer determines that legal action is appropriate . . . until such legal action has been completed."). For the Sacketts, that would mean (a) removing all the fill; and, (b) restoring the preexisting "wetlands," which would necessitate leaving the property untouched for a prolonged period

of time.[10] *See* Pet. App. G-4 - G-5. Few landowners could afford the cost or the time. Second, the time and money involved in just applying for a permit is significant. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (plurality opinion) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes."). There is no guarantee that the permit will be granted, with or without substantial conditions. And should a landowner succeed in a subsequent lawsuit challenging the agency's permitting jurisdiction, none of the permitting costs would be refundable. *Cf. Thunder Basin*, 510 U.S. at 220-21 (Scalia, J., concurring in part and concurring in the judgment) ("[C]omplying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs."). Thus, this "option" too is really no option at all.

EPA's use of the compliance order is far from rare: between 1980 and 2001, the agency issued from 1,500 to 3,000 compliance orders every year across the country. Wynn, *supra*, at 1895. EPA's recent practice is somewhat below historical trends. *See* U.S. EPA, Office of Enforcement and Compliance Assurance,

[10] As noted earlier, *see supra* n.3, the original compliance order contained an express three-year monitoring program during which the property would have to be left untouched.

OECA FY 2008 Accomplishments Report App. B (Dec. 2008)[11] (1,390 compliance orders issued). But given the agency's recent public commitment to increasing its enforcement program,[12] there is every expectation that EPA's reliance on the compliance order will continue and increase. That reliance is troubling when one considers that, as of the late 1990s, EPA referred only about 400 cases annually for judicial enforcement to the Department of Justice. Wynn, *supra*, at 1895. These statistics imply that EPA circumvents the normal avenues of enforcement through courts, by in their place using essentially unreviewable administrative orders to compel landowners to comply with the agency's dictates.

The Ninth Circuit reasoned that the Sacketts and other innocent landowners have no right of access to a federal court because no formal action has yet been brought to sanction them. But that assessment ignores the realities of the Sacketts' and other landowners' circumstances, in its implicit assumption that the Sacketts (and all citizens in similar situations) can afford to defy an order, backed by threats of severe financial penalty, issued by the United States government, and simply await an action for sanctions. The reality of the Sacketts' situation is that they have been unambiguously commanded by their government not to complete their home-building project, to take

[11] *Available at* http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy08accomplishment.pdf (last visited Feb. 17, 2011).

[12] *See generally* U.S. EPA, Office of Enforcement and Compliance Assurance, *Clean Water Act Action Plan* (Oct. 15, 2009, rev. Feb. 22, 2010), *available at* http://www.epa.gov/oecaerth/resources/policies/civil/cwa/actionplan101409.pdf (last visited Feb. 17, 2011).

expensive measures to undo the improvements that they have made to their land, and to maintain their land essentially as a public park until the property is "restored" to the satisfaction of the EPA. They have been threatened with frightening penalties if they do not immediately obey; but they have been refused the prompt hearing they should have received as a matter of right in any court. Thousands of landowners across the country are in similar straights. This Court's review is merited.

II

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THE COURTS OF APPEALS

Essential to the Ninth Circuit's holding that the CWA's compliance order regime does not violate due process was the court's interpretation of Section 309(a)(3) to permit property owners to raise a jurisdictional defense if and when EPA decides to seek in court enforcement of a compliance order, or penalties for its violation. Pet. App. A-11 - A-12. The Ninth Circuit's interpretation of Section 309(a)(3) directly conflicts with the Eleventh Circuit's decision in *TVA v. Whitman*. Although *TVA* dealt with the Clean Air Act (CAA) compliance order regime, the Eleventh Circuit expressly noted that the two statutory regimes are, for the issues presented here, substantively identical. *See TVA*, 336 F.3d at 1256 n.32

In *TVA*, EPA issued a CAA compliance order against TVA, which the latter refused to abide by on the theory that it could not be sued in federal court. The Eleventh Circuit held that enforcement of the compliance order would violate the Due Process Clause

because the CAA did not afford any basis for contesting the compliance order. *See id.* at 1258. Under the CAA, as under the CWA, EPA may issue a compliance order, on the basis of "any information available" to the agency, that the CAA has been violated, and thereupon require a regulated party to conform its conduct accordingly. *See* 42 U.S.C. § 7413(a)(3)(B). Further, the CAA, just as the CWA, authorizes the assessment of civil penalties for violations of compliance orders. *Id.* § 7413(d). *See TVA*, 336 F.3d at 1242. Critical to the Eleventh Circuit's holding that CAA compliance orders are unconstitutional was its conclusion that CAA compliance orders have the force of law and impose liability independent of the statute. *See TVA*, 336 F.3d at 1255-56. Under the plain logic of *TVA*, that conclusion holds for CWA compliance orders as well.

The Ninth Circuit acknowledged that its interpretation of CWA Section 309(a)(3) was contrary to the Eleventh Circuit's reading, but reasoned that the statutory language "is 'not a model of clarity,'" and that the language could—and should—be interpreted in a way that would avoid unconstitutionality. Pet. App. A-11 (quoting *Atl. States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1137 (11th Cir. 1990)). Yet in response to this "avoidance" approach, the Eleventh Circuit was clear: "no canon of statutory interpretation can trump the unambiguous language of a statute." *TVA*, 336 F.3d at 1255. The statutory language, according to the Eleventh Circuit, unambiguously precludes the recipient of a compliance order from raising a jurisdictional defense, and for that reason the compliance order cannot be enforced without first giving the order's recipient an

opportunity to contest it.[13] *Cf.* Jason D. Nichols, *Towards Reviving the Efficacy of Administrative Compliance Orders: Balancing Due Process Concerns and the Need for Enforcement Flexibility in Environmental Law*, 57 Admin. L. Rev. 193, 215 (2005) ("[T]he *TVA* opinion . . . deserves credit for observing the constitutional frailties of the EPA's [compliance order] process."). This clear conflict between the Ninth Circuit's decision and the Eleventh Circuit's decision in *TVA* merits this Court's review.

CONCLUSION

The EPA's compliance order regime puts the Sacketts, and innocent landowners like them throughout the country, in an impossible situation. To get their day in court, these landowners must either

[13] The CAA provides in relevant part that "whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated, or is in violation of, any other requirement or prohibition of this title . . . , the Administrator may . . . issue an order requiring such person to comply with such requirement or prohibition." 42 U.S.C. § 7413(a)(3)(B). The CWA provides in relevant part that "[w]henever on the basis of any information available to him the Administrator finds that any person is in violation of [various provisions of the Act], he shall issue an order requiring such person to comply with such section or requirement . . . ." 33 U.S.C. § 1319(a)(3). Hence, the Eleventh Circuit's conclusion that the two statutory compliance order regimes are essentially the same is substantiated by the statutes' plain meaning. In fact, the CAA regime is on its face *less* offensive to due process principles than the CWA regime, because the former generally requires the EPA Administrator to provide notice before issuing a compliance order, *see* 42 U.S.C. § 7413(a)(4), whereas the CWA has no such requirement.

run the risk of ruinous penalties and imprisonment, or "purchase" their right of judicial review through the permit process, even if the purchase price is more than the value of their land. If the Sacketts and other landowners are not given an opportunity for full judicial review of their compliance order free of EPA's onerous conditions, their due process rights will be violated. This Court's review is needed.

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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