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No. 10-1062

In the
Supreme Court of the United States

CHANTELL SACKETT and MICHAEL SACKETT,

Petitioners,

v.

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

Respondents.

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

**REPLY TO OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

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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INTRODUCTION

Petitioners Chantell and Michael Sackett respectfully submit this Reply to the Opposition Brief of Respondents United States Environmental Protection Agency, *et al.* (EPA). EPA contends that this Court's review is unnecessary because the lower court's decision was correct, and because there is no circuit conflict. But EPA is wrong and nowhere does it rebut the Sacketts' argument that review is merited in this Court because of the nationwide importance of the issue presented. That issue is whether a landowner can obtain judicial review of a unilateral EPA compliance order issued under the Clean Water Act (CWA) only if he invites an enforcement action risking tens, if not hundreds, of thousands of dollars in penalties and criminal sanctions, or endures the prohibitively expensive and potentially fruitless permitting process. EPA's attempts to distinguish *Tennessee Valley Authority (TVA) v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), are unavailing. The Eleventh Circuit's decision squarely conflicts with the Ninth Circuit's decision below. Certiorari should therefore be granted.¹

¹ Contrary to EPA's contention, Opp'n at 5 n.2, the Sacketts *do* challenge the Ninth Circuit's holding that the CWA statutorily precludes pre-enforcement judicial review of compliance orders. The Sacketts believe that this Court need not hold the CWA's compliance regime to be unconstitutional to reach the correct result. Rather, the Court can simply hold that the CWA should not be interpreted to preclude judicial review of compliance orders, because such preclusion would be unconstitutional. *Cf. Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (articulating the "avoidance" canon).

**THE AVAILABILITY OF
JUDICIAL REVIEW UNDER THE
CLEAN WATER ACT IS AN ISSUE
OF NATIONWIDE SIGNIFICANCE
MERITING THIS COURT'S REVIEW**

The rule adopted by the Ninth Circuit's decision will have a significant nationwide impact because it has the potential to affect land use on hundreds of millions of acres. *See Pet.* at 9. Also, the rule will have a significant effect because EPA relies regularly on the compliance order regime to administer its environmental agenda without having to submit to the strictures of judicial review. *See Pet.* at 13-14. None of EPA's arguments seeking to minimize the impact of the Ninth Circuit's decision is convincing.

EPA observes that compliance orders are not "self-executing" because EPA must go to court before it can enforce an order against a landowner. *See Opp'n* at 4. EPA is correct that it must go to court before it can enforce a compliance order, but the agency nevertheless admits that compliance orders have the force of law and that a landowner can eventually be held liable for having violated them.² *See Opp'n* at 9. Yet ultimately EPA's characterization of compliance orders is irrelevant to the question presented. The due process rights of the Sacketts and other compliance order recipients are violated regardless of how one

² EPA cites 33 U.S.C. § 1319(b) for the proposition that the agency is not authorized to bring a civil enforcement action for violation of a compliance order only. Whatever the merit of EPA's statutory interpretation, the agency does not deny that a landowner could still be liable, in one civil enforcement action, for violations of the CWA itself *and* for a related compliance order.

characterizes the order. Their rights are infringed because judicial review of the order is triggered only by exposing oneself to ruinous fines or by submitting to an onerous and economically senseless permitting process.³

EPA tries to play down the significance of these penalties and the costs of the permitting process. The agency notes that penalties for violations of compliance orders can only be assessed after a hearing, and that the ultimate amount of any penalty is left to the discretion of a judge, not the agency. *See* Opp'n at 9-10. Although EPA is correct that a fine cannot be assessed without a judicial proceeding, EPA's observation fails to address the relevant point articulated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). It is no cure to the due process violation that a fine can only be exacted after a hearing, where the conditions for obtaining the hearing in the first place are constitutionally intolerable. *Cf. id.* at 218.

Further, the force of EPA's point assumes that full judicial review is ultimately available. *TVA* says that the assumption is unwarranted. *See* 336 F.3d at 1256. That holding forms a separate basis for review in this Court. *See* Pet. at 15-17. And, although the ultimate amount of a fine is left to judicial discretion, the "good-faith efforts" of a Clean Water Act violator are only *one* factor that a court may take into account. *See* 33 U.S.C. § 1319(d). That is little assurance to a landowner who is still potentially liable for a very large

³ The amicus brief of the Center for Constitutional Jurisprudence ably explains how the CWA's compliance order regime impinges upon constitutionally protected private property rights. *See* Am. Br. of Ctr. for Const. Jurisp. at 5-8.

fine. *See* Pet. at 10 (estimating a year's worth of noncompliance liability at \$9 million).

Additionally, EPA relies on the existence of the Clean Water Act permitting regime as an adequate avenue for judicial review. *See* Opp'n at 10-11. But, EPA's reliance is misguided. Generally, a landowner must first resolve a compliance order *before* applying for a permit. *See* 33 C.F.R. § 326.3(e)(1)(ii). The average cost of an individual Clean Water Act permit is in the hundreds of thousands of dollars. *See* Pet. at 13. And the permitting option is economically irrational for many compliance order recipients, because the cost of a permit can significantly exceed the value of the property or project in question.

Therefore, the Ninth Circuit's decision leaves compliance order recipients without a constitutionally adequate means of judicial review. The decision is an issue of nationwide significance meriting this Court's review.

II

THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE ELEVENTH CIRCUIT'S DECISION IN *TVA v. WHITMAN*

The Ninth Circuit's decision squarely conflicts with the Eleventh Circuit's decision. *See* Pet. at 15-17. EPA's attempts to explain away this plain conflict are unpersuasive.⁴

⁴ The amicus brief of the American Civil Rights Union ably explains how the Ninth Circuit's and the Eleventh Circuit's decisions are irreconcilable. *See* Am. Br. of Am. Civil Rights Union at 12-14.

EPA argues that *TVA* does not squarely conflict with the decision below because *TVA* dealt with the Clean Air Act (CAA), not the Clean Water Act. The Eleventh Circuit, however, clearly believed that its holding with respect to the Clean Air Act would apply with equal force to the Clean Water Act. *See TVA*, 336 F.3d at 1255 n.32 (noting that the CWA “uses many provisions that are identical to those found in the Clean Air Act” and that “the entire [CWA] subsection is entitled ‘compliance orders.’”). EPA argues further that the Eleventh Circuit failed to grasp the importance of language in the Clean Water Act, not present in the Clean Air Act, that allows the two statutory regimes to be distinguished. *See Opp’n* at 12-13 & n.3 (discussing 33 U.S.C. § 1319(b)). But the conflict exists regardless of EPA’s post hoc attempts at reconciliation. A court within the Eleventh Circuit would be duty-bound to follow *TVA*’s plain meaning, not EPA’s gloss which limits *TVA*’s application to the Clean Air Act. And, more importantly, even the Ninth Circuit below realized that its decision conflicted with *TVA*. *See Pet. App.* A-10 to A-11 (noting that *TVA* “identified constitutional problems with a similar compliance-order provision in the CAA” but nevertheless “declin[ing] to interpret the CWA in this manner”).

EPA contends that any due process violation can be avoided by reading the Clean Water Act to allow a compliance order recipient to raise a jurisdictional objection as a complete defense in an enforcement proceeding. *See Opp’n* at 14. But this does not eliminate the constitutional problem, because the cost to obtain judicial review under the Clean Water Act is impermissibly high. Moreover EPA’s argument does nothing to remedy the conflict between *TVA* and the

decision below. *TVA* specifically rejected the EPA's argument, accepted by the Ninth Circuit, that the compliance order regime should be read so as to allow the raising of a jurisdictional defense. *See TVA*, 336 F.3d at 1255-56.

EPA also draws support for its view of the case law (and *TVA*'s place in it) from the fact that no other court of appeals has held that the Clean Water Act compliance order regime violates a landowner's due process rights. *See Opp'n* at 7-8. EPA's observation is unhelpful because the cases besides *TVA* have all assumed that a compliance order recipient could ultimately obtain full judicial review (even if the cost of that review were very high).⁵ But, as noted in the preceding paragraph, *TVA* rejected jurisdiction as a defense to a compliance order.

The decision below conflicts with that of the Eleventh Circuit in *TVA*. Therefore, review in this Court is merited to resolve that conflict.

⁵ Further, none of the relevant appellate decisions gives serious consideration to the central concern of this Court's decision in *Thunder Basin*: whether the ostensible avenues to judicial review are too onerous to be considered constitutionally adequate. The amicus brief of National Association of Home Builders, *et al.*, ably explains how the lower court misapplied the rule of *Thunder Basin* to the Sacketts' case. *See Am. Br. of Nat'l Ass'n of Home Builders* at 15-17.

CONCLUSION

To address both a conflict between Circuits and an important federal question, the petition for writ of certiorari should be granted.

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Respectfully submitted,

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