No. _____

In The
Supreme Court of the United States

WARREN M. LENT, et al.,
Petitioners,

v.

CALIFORNIA COASTAL COMMISSION, et al.,
Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

PAUL J. BEARD II
FisherBroyles LLP
4470 W. Sunset Blvd.,
Suite 93165
Los Angeles, CA 90027
Telephone: (818) 216-3988
paul.beard@fisherbroyles.com

DAMIEN M. SCHIFF*
**Counsel of Record*
JOSHUA P. THOMPSON
JEREMY TALCOTT
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
JThompson@pacificlegal.org
JTalcott@pacificlegal.org

Counsel for Petitioners

QUESTIONS PRESENTED

In 2002, Petitioners Warren and Henny Lent bought a beachfront home in Malibu, California. Along the house's east side, prior owners had long ago installed a gate, an exterior stairway, and similar residential accessories. Several years after their purchase, the Lents received a notice of violation from the staff of the California Coastal Commission contending that the Lents had violated the California Coastal Act by not removing these side-alley structures. Ultimately, Commission staff followed up on that notice by initiating an administrative penalty order proceeding against the Lents, seeking a fine of $950,000. At the December 2016, penalty hearing, the Lents and their attorney were allowed to speak and to present evidence. But they were afforded no right to subpoena witnesses or documentary evidence, no right to notice of those who would testify against them at the hearing, no right to demand testimony under oath, no right to confront or cross-examine witnesses, no right to exclude hearsay or speculative evidence, and no right to present rebuttal testimony or evidence. At the hearing's conclusion, the Commission approved a penalty of $4.185 million against the Lents. One Commissioner explained that more than quadrupling the staff recommendation was necessary because "we don't want to be in a position . . . rewarding . . . applicants that have been fighting us."

The questions presented are:

1. Can a state administrative agency, consistent with the Due Process Clause of the Fourteenth Amendment, permanently deprive a person of millions of dollars in fines using a summary hearing

process that dispenses with the heightened procedural safeguards traditionally afforded those who face a significant deprivation of property?

2. Is a $4.185 million fine, assessed to punish homeowners for failing immediately to remove ordinary residential accessories located within an undeveloped public beach-access easement, unconstitutional under the Excessive Fines Clause of the Eighth Amendment, as incorporated against the states by the Fourteenth Amendment?

LIST OF ALL PARTIES

The Petitioners are Warren and Henny Lent, as individuals and as trustees of the Lent Family Living Trust dated May 22, 1995.

The Respondents are the California Coastal Commission, the California Coastal Conservancy, and the Mountains Recreation and Conservation Authority, the latter two entities as real parties in interest.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

- *Lent v. Cal. Coastal Comm'n*, No. BS167531, Los Angeles County Superior Court, filed May 24, 2018

- *Lent v. Cal. Coastal Comm'n*, No. B292091, 62 Cal. App. 5th 812 (Cal. Ct. App. 2d. Dist. Apr. 5, 2021), *as modified on denial of rehearing*, Apr. 16, 2021

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PETITION FOR WRIT OF CERTIORARI

Petitioners Warren and Henny Lent respectfully petition for a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District.[1]

OPINIONS BELOW

The opinion of the California Court of Appeal is published at 62 Cal. App. 5th 812 and is reproduced in the Appendix beginning at A-1. The opinion of the Superior Court for the County of Los Angeles is not published but is reproduced in the Appendix beginning at B-1.

JURISDICTION

The opinion and judgment of the California Court of Appeal, as modified on denial of rehearing, became final on May 5, 2021. The California Supreme Court denied Petitioners' timely petition for review on July 21, 2021. App. E-1. Jurisdiction is conferred under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS AT ISSUE

The pertinent text of the following constitutional, statutory, and regulatory provisions involved in this case is set out in the Appendix.

- U.S. Const. amend. VIII

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[1] The Lents petition individually and as trustees of the Lent Family Living Trust dated May 22, 1995.

- U.S. Const. amend. XIV, § 1.
- Cal. Pub. Resources Code §§ 30810, 30811, 30812, 30820, 30821
- Cal. Code Regs. tit. 14, §§ 13181, 13183, 13185

INTRODUCTION

In 2014, the California Legislature amended the state's Coastal Act, Cal. Pub. Res. Code §§ 30000–30900, to give Respondent California Coastal Commission the power to issue administrative penalty orders to punish violations of the Act's "public access provisions." Cal. Stats. 2014, c. 35, § 147 (enacting new Cal. Pub. Res. Code § 30821). The defendant in such a penalty order proceeding is subject to a fine of up to $11,250 per day per violation, going back up to five years. *See* Cal. Pub. Res. Code § 30821(a). Although given notice of the proceeding and an opportunity to present evidence at a public hearing, *see id.* § 30821(b); Cal. Code Regs. tit. 14, §§ 13181–13185, the accused—like Petitioners the Lents—are bereft of any other procedural safeguard:

- no notice of those who may testify at the hearing
- no right to subpoena
- no right to cross-examine witnesses
- no right to demand that testimony be under oath

- no right to exclude hearsay or speculative evidence

- no right to present rebuttal

See App. A-35, A-37 to A-38.

At the conclusion of this summary proceeding, any penalty order issued by the Commission is immediately effective. *See* App. C-12 (Comm'n penalty order). The consequences of nonpayment are severe: in addition to triggering further penalties, *see* Cal. Pub. Res. Code § 30822, the failure to pay allows the Commission to "record a lien on the property in the amount of the penalty [and this] lien shall have the force, effect, and priority of a judgment lien," *id.* § 30821(e). The recipient of the penalty order may seek judicial review, but such review is limited to a closed administrative record and subject to the agency-friendly legal standards of California writ of mandate practice. *See id.* § 30801 (authorizing review through Cal. Code Civ. Proc. § 1094.5). For example, not only are the Commission's factual findings presumed to be supported by the record, *11 Lagunita, LLC v. Cal. Coastal Comm'n*, 273 Cal. Rptr. 3d 158, 167 (Ct. App. 2020), but those findings can be validated by mere hearsay, *see* Cal. Code Regs. tit. 14, §§ 13186, 13065 (authorizing admission of evidence despite "any common law or statutory rule which might make improper the admission of such evidence").

This penalty power is unprecedented. The California court of appeal below could identify no other administrative agency *in the nation* that has the ability to issue crushing financial penalties while

guaranteeing the defendant only the barest of procedure safeguards. Despite this lack of precedent, the court of appeal upheld the summary process of the Coastal Act's administrative penalty proceeding, as well as its application against the Lents culminating in a nearly $4.2 million penalty. Looking to the factors used by this Court for determining the adequacy of pre-deprivation administrative procedure, *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the court of appeal concluded that (i) the interest of the accused in a Coastal Act penalty order hearing is not particularly weighty because the Commission is not *compelled* to assess any fine, App. A-36 to A-37, and (ii) heightened procedural protections like the right to cross-examine are not needed because the issues in dispute in a penalty order proceeding typically will turn on documentary evidence or evaluative considerations, App. A-39 to A-40.

In affording minimal weight to the *Mathews* "personal interest" factor for penalty order defendants, the court of appeal parted company with this Court and other lower courts by assessing the pre-deprivation process of a Coastal Act penalty order hearing according to the *best* outcome for the accused, rather than the worst or even just the most probable. *See infra* Part I. The court of appeal also ignored the presumption, long recognized by this Court and other lower courts, that heightened procedural protections like cross-examination are *always* necessary when the accused faces a serious deprivation—even in proceedings where documentary evidence or evaluative considerations may at times play a role. *See infra* Part II. Resolution of the conflicts created by the decision as to how the constitutional fairness of

administrative penalty procedure should be assessed under *Mathews* is urgently needed. *See infra* Part IV.

Besides these review-worthy issues of due process, the petition should be granted to address the important question of whether a multi-million-dollar penalty, levied for the alleged offense of impeding the development of a beach accessway, is unconstitutional under the Excessive Fines Clause of the Eighth Amendment, as incorporated against the States. In concluding that the Lents' $4.185 million fine was not unconstitutionally excessive, the court of appeal below correctly cited the "grossly disproportional" standard that this Court has used to determine whether a fine is permissible. App. A-57 to A-58 (citing *United States v. Bajakajian*, 524 U.S. 321 (1998)). But in upholding the constitutionality of the Lents' seven-figure fine, the court of appeal diverged from this Court's ruling in *Bajakajian* by failing to assess the Lents' alleged wrongdoing and resulting harm in a *comparative* context. The court of appeal gave the Lents no credit for the fact that their alleged wrongdoing—failing affirmatively to facilitate the development of a public beach-access easement—bears none of the hallmarks traditionally associated with conduct meriting steep punitive fines. For example, the Lents were not found guilty of any wrongful *affirmative* act, much less any wrongful act that threatened the public health or safety. By refusing to assess the Lents' alleged wrongdoing in a comparative context, the court of appeal split with a number of federal circuit courts, as well as the high courts of other state jurisdictions, which have emphasized the importance of such a comparative approach when determining the

constitutionality of fines under *Bajakajian*. *See infra* Part III.

The need for review of the excessive fines issue is also strong and urgent. "Fines are the most common form of punishment levied in the United States." Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 Ohio St. L.J. 65, 66 (2020). Yet the Court's ruling in *Bajakajian* gave lower courts "only limited guidance." Matthew C. Solomon, Note, *The Perils of Minimalism:* United States v. Bajakajian *in the Wake of the Supreme Court's Civil Double Jeopardy Excursion*, 87 Geo. L.J. 849, 884 (1999). As a consequence, the protections of the Excessive Fines Clause "vary from jurisdiction to jurisdiction, with each jurisdiction free to apply its own test so long as it includes the phrase 'grossly disproportional.'" Harawa, *supra*, at 92. Granting the Lents' petition will allow the Court to bring consistency across jurisdictions to excessive fines jurisprudence and to provide the lower courts a much-needed "roadmap to check against potential constitutional abuses." *Id*. at 92.

STATEMENT OF THE CASE

In 2002, the Lents bought a three-bedroom home in Malibu. App. A-3; Administrative Record (AR) 668. The house sits between the Pacific Ocean and a busy stretch of the Pacific Coast Highway. AR 2231, 2429. An alley of sorts exists along the home's east side. When the Lents purchased the house, this side-alley contained a gate, a couple of planters, a mailbox, and an exterior stairway leading from the home's second floor to a wooden landing. *See* App. A-3. The landing sat atop a concrete storm drain that is owned by Los

Angeles County. To traverse the alley from the sidewalk to the public beach involves "several steep elevation drops." App. A-8. Immediately seaward of the sidewalk is a sharp six-to-seven-foot drop onto the storm drain. AR 2331–32, 3355. At the edge of the storm drain is another precipitous drop of nearly 14 feet to the beach below. *See* App. P-1 (view of the easement area looking seaward); App. P-2 (view of the easement area looking landward)].[2]

Five years after their purchase, the Lents received without prior warning a "Notice of Coastal Act Violation" from Commission staff. AR 703. It stated that the Commission had, in 1982, obtained from the home's original owner a vertical public easement five feet wide.[3] The easement, the notice elaborated, lies on the home's east side, beginning at the sidewalk along the street side of the house and extending over the County storm drain southward to

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[2] By January 2019, the Lents had removed all of the structures (save the County storm drain) to comply with the Commission's cease-and-desist order. *See* App. A-19 n.3. The day after the Lents took out the gate, the Respondent Mountains Recreation and Conservation Authority (the current holder of the vertical access easement) installed its own gate. A permit application to develop the easement has been pending with the City of Malibu since July 2019. *See* Resp. Request for Judicial Notice, at 3–4, Case No. B292091 (Cal. Ct. App. 2d Dist. filed Sept. 3, 2019).

[3] The Commission's policy of requiring such easements as a condition to granting a permit to build was later held to be unconstitutional. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838–42 (1987). But shortly after *Nollan*, the California court of appeal ruled that easements exacted unconstitutionally before *Nollan* remain fully valid under California law. *Cal. Coastal Comm'n v. Superior Court (Ham)*, 258 Cal. Rptr. 567, 570–74 (Ct. App. 1989).

the beach. App. A-8; AR 703. The notice then set forth the Commission staff's argument for why the gate and other structures in the side-alley were illegal under the Coastal Act.

Pursuant to that statute, the undertaking in the "coastal zone"[4] of most "development"—a broadly defined term that includes "the placement . . . of any solid material or structure," Cal. Pub. Res. Code § 30106—requires a coastal development permit. *See id.* § 30600. In the Commission staff's view, the structures in the Lents' side-alley were not authorized under the Coastal Act because, staff claimed, the Commission had no record of a coastal development permit having been specifically issued for them, and because the structures' presence purportedly violated the condition of the home's original coastal development permit requiring the dedication of a vertical access easement along the east side of the house. AR 703–04. *See* App. A-20 to A-21.

The 2007 notice of violation kicked off a series of letters, emails, and other communications among Commission staff, the Lents, and their counsel over the next nine years. The Lents' consistent position throughout this period was that the structures were legal. Based on their review of the house's permitting history and the advice of their counsel, they concluded that the structures had been approved by the Commission and its executive director when the final

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[4] *See generally* Cal. Pub. Res. Code § 30103. The coastal zone's landward boundaries vary from "several hundred feet in highly urbanized areas up to five miles in certain rural areas." Cal. Coastal Comm'n, Our Mission, https://bit.ly/3xFlqXb (last visited Oct. 6, 2021).

permits for the home were issued in the early 1980s. *See* App. A-21 to A-22. But aside from any dispute about Coastal Act permitting compliance, the Lents were understandably reluctant to surrender to the Commission staff's demand for the removal of all of the structures given that the public access easement is non-exclusive. AR 559 (rev. Comm'n staff rep.). The Lents therefore retained the right as servient owners to use that area so long as they did not impede the development of a feasible public accessway,[5] a proviso they reasonably believed could not be triggered unless and until a plan to develop the easement were approved by the pertinent state and local agencies.[6]

Nevertheless, the Lents made clear that they were prepared to remove any structures that proved to be inconsistent with a feasible plan to develop the easement. *See, e.g.*, AR 2946–47 (letter from Lents' counsel to Comm'n staff). To substantiate their good faith and willingness to cooperate, the Lents provided a gate-key to the California Coastal Conservancy, the then-holder of the easement, to facilitate the accessway's development. *See* AR 883 (Lents' counsel's letter to Comm'n staff). The Lents also offered to move the easement to the west side of their home, an area that was free of structures and, they

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[5] *See generally City of Pasadena v. Cal.-Mich. Land & Water Co.*, 110 P.2d 983, 985 (Cal. 1941) (the "general rule" is that "the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement.").

[6] Such approval may well never come, given the substantial design challenges presented. *See* Appellants' App. Vol. I, at 265 (Lents' engineering expert concluding that each of the three initial proposals to develop the easement is "impractical and unlikely to be achievable").

believed, would present far fewer engineering challenges. *See id.* at 884.

Despite the Lents' efforts at compromise and conciliation, Commission staff remained firm that removal of the structures could not be conditioned on approval of a plan to develop the easement; in other words, the structures had to go regardless of when (if ever) development of the accessway were to commence. *See* AR 2260 (Comm'n staff letter to Lents' counsel) (structures' mere presence "negatively affects" the ability to finalize a plan for construction).

By September 2016, an impasse had been reached. Commission staff therefore notified the Lents of its intent to seek from the Commission a cease-and-desist order requiring immediate removal of all structures, as well as something (at the time) new—an administrative penalty order. AR 2281–88. *See* App. A-9.

The Commission has for decades had the power to issue cease-and-desist orders, *see* Cal. Stats. 1991 c. 761, § 4, at 3412–13, and to seek penalties through an action filed in superior court, *see* Cal. Stats. 1976 c. 1330, § 1, at 6003–04. But it was not until 2014 that it received from the California Legislature the power unilaterally to issue penalty orders without first having to prove in court the underlying violation and the propriety of the penalty amount. As noted above, this new section 30821 of the California Public Resources Code authorizes the Commission to assess administrative penalties for any violation of the public access provisions of the Coastal Act. Cal. Pub. Res. Code § 30821(a). These penalties may be levied on a daily basis for up to five years, and up to $11,250 per

day. *Id.* The smallest maximum fine that an accused may face is a hefty $348,750.[7] Revenue from the fines is then placed in a Violation Remediation Account and expended, according to a memorandum of understanding between the Commission and Coastal Conservancy, for Commission projects. *See* Cal. Pub. Res. Code § 30821(j); App. A-53 to A-54. The Commission therefore has a strong financial incentive to levy maximum fines.

For procedure, the statute directs that the Commission use the same process that it employs for cease-and-desist orders and similar land-use matters. *See* Cal. Pub. Res. Code § 30821(b). Accordingly, the accused is given notice of the hearing, a written summary of the charges against him or her ten days prior, the right to submit evidence to the record, and the right to speak to the Commission at a public hearing following the Commission staff's initial presentation. *See* App. A-37 to A-38; Cal. Pub. Res. Code § 30810; Cal. Code Regs. tit. 14, §§ 13181–13185. But the accused is given no notice of those who may testify at the hearing, *see* Cal. Coastal Comm'n, Meetings: Rules & Procedures (2019) ("If you wish to speak, please fill out a 'Request to Speak' form and give it to a staff person prior to the matter being heard."), no right to cross-examine witnesses,[8] no

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[7] That is, 31 days times $11,250. This would occur if Commission staff were to provide the accused with notice of the alleged violation on the same day that the violation commenced, and the accused were to cure the alleged violation one day after the statutory 30-day grace period. *Cf.* App. A-36 to A-37 (discussing Cal. Pub. Res. Code § 30821(h)).

[8] The accused merely has the "right" to "propose to the Commission before the close of the hearing any question(s) for

power to demand testimony under oath or to exclude hearsay or other unreliable testimony, *see* Cal. Code Regs. tit. 14, §§ 13186, 13065, and no right to present any rebuttal evidence, *id.* § 13185(d)–(e) (allowing other speakers to testify after the alleged violator has concluded its testimony and presentation). *See* App. A-35.

Trying to make the most of this minimal procedure afforded them, the Lents submitted evidence that the structures were permitted, including (i) plans approved by Los Angeles County and referenced in the Commission's own files that depict the original homebuilder's intent to place a stairway along the house's east side, as well as (ii) declarations from architects with relevant experience stating under oath that, at the time that the house's construction was approved, the Commission did not require accessory structures like gates and exterior steps to be shown in permit applications.[9] App. A-21 to A-22. At the hearing itself, the Lents' attorney and Warren Lent testified, App. A-10, the latter emphasizing that he and his wife were not trying to block any public access, but merely wanted to ensure the safety of their home's occupants as well as of the general public. The former would be

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any Commissioner, in his or her discretion, to ask of any other speaker." Cal. Code Regs. tit. 14, § 13185(a).

[9] The Lents had no opportunity to confront and examine those Commission staff who submitted declarations to the record shortly prior to the hearing purporting to contradict the Lents' evidence about (i) the Commission's past permitting practices and (ii) on-site discussions between the Lents and Commission staff about the legality of the Lents' side-alley structures. *Cf.* AR 565, 567 (revised Commission staff report relying on these staff declarations).

achieved by maintaining the stairway as a secondary emergency egress from the home, the latter by keeping the gate in place to prevent passers-by from falling down the half-dozen feet to the storm drain landing. *See* AR 4216–17 (hearing transcript).

Following the Lents' presentation, the Commission heard testimony again from its staff as well as from the public, including representatives from the Conservancy and the Mountains Recreation and Conservation Authority, the current holder of the easement. These false statements against the Lents—which they had no opportunity to rebut and which became part of the Commission's record—ranged from allegations about the supposed infeasibility of alternative access proposals, to how quickly the access easement could be developed once the structures were removed, to how much money the Lents had made from using their house as a vacation rental, and the extent to which the Lents had designed to thwart public access. *See, e.g.*, AR 4225–27 (Conservancy staffer speaking to the alleged unworkability of the Lents' alternative access proposals); AR 4235–40 (representative of the California Coastal Protection Network testifying to the Lents' property's supposed rental revenue based on her own research); AR 4219–20 (Authority's executive director inaccurately referring to the Lents' neighbors' private staircase as an available accessway to the beach and incorrectly stating that the Authority was "prepared immediately to open this access way up using this facility right now" with the help of "rangers").

The Commission then closed the public hearing and began to deliberate. They agreed with the staff

recommendation that a cease-and-desist order should be issued. With respect to the penalty, most of the Commissioners who spoke were of the opinion that the staff's recommendation—between $800,000 and $1,500,000, with a specific proposed penalty of $950,000, App. A-10—was far too low. As one Commissioner who urged a $6.5 million fine put it, "I also want to . . . make it very clear to not only the Lents, but all the other people who are currently in violation for not having opened up access ways that there are serious penalties." AR 4267, 4286. The Commissioners ultimately settled upon a penalty of $4.185 million, more than four times the staff recommendation. App. A-11. Such a high fine was necessary because, in another Commissioner's estimation, "we don't want to be in a position . . . rewarding . . . applicants that have been fighting us." AR 4263.

The Lents sought review of the Commission's orders through a petition for writ of mandate and complaint for declaratory relief filed in the Superior Court for the County of Los Angeles. *See* App. A-11; B-1, B-5. The Lents alleged, among other claims, that the penalty order statute on its face, and as applied to them, violates the Due Process Clauses of the United States and California Constitutions, and that the $4.185 million penalty is unconstitutional under the Excessive Fines Clauses of the same. The trial court granted the petition in part, concluding that the Commission's proceeding did not satisfy the Lents' due process rights. App. B-75. The court ordered the Commission to provide a new hearing, to inform the Lents at the start of that hearing of the precise penalty proposed to be levied against them, and to

allow the Lents to provide additional evidence against that proposed penalty. App. B-76.

The Lents appealed and the Commission cross-appealed. In its ruling on both appeals, the court of appeal affirmed the Commission's orders in their entirety. The court of appeal held that the procedures authorized by the penalty order statute and the Commission's regulations satisfy due process. Among other reasons for that conclusion, the court offered the following: due process generally does not require administrative proceedings to offer the full measure of trial-like safeguards, App. A-35, especially when the evidence is principally documentary and the decision is largely evaluative, App. A-39 to A-40; the Commission is not compelled to issue any minimum penalty, App. A-36; and the Commission's decision to employ cost-saving summary procedure to briskly resolve alleged public access violations is entitled to deference, App. A-41 to A-42. The court also ruled that the Commission's $4.185 million penalty order is not unconstitutionally excessive because, among other reasons, the impeding of beach access by failing to remove supposed obstructions thereto is a serious offense. App. A-60 to A-62.

The Lents petitioned for rehearing. In response, the court of appeal made two minor modifications to its opinion but otherwise denied the petition. App. D-1 to D-2. The Lents then sought review of their due process and excessive fines claims in the California Supreme Court. That court denied review without opinion. App. E-1.

REASONS FOR GRANTING THE PETITION

I.

Certiorari Should Be Granted To Resolve the Many Conflicts Created by the Decision Below as to the Procedural Safeguards Required To Protect the "Personal Interest" of the Accused

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). For any substantial deprivation, that means a full evidentiary hearing. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546–48 (1985) (summary hearing prior to dismissal from public employment permissible only if followed by "a full post-termination hearing"). Such a hearing must at least be offered promptly after the deprivation, *see Barry v. Barchi*, 443 U.S. 55, 66 (1979), but sometimes heightened procedures need to be provided even before the deprivation, *see Goldberg v. Kelly*, 397 U.S. 254, 268–70 (1970). Whether a pre-deprivation hearing must be provided and, if so, what procedures it must follow, depend on (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used" and "the probable value . . . of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

In rejecting the Lents' due process challenge against the penalty order statute, the court of appeal gave little weight to the accused's personal interest under the first *Mathews* factor. The court reasoned that this factor was not particularly relevant given that the Commission is not *required* to impose any penalty. App. A-36. The court's reasoning conflicts with decisions of this Court, as well as of other lower courts, that have held that what matters is the upper limit of the deprivation that may result, not the possibility that the deprivation may ultimately be avoided.

For example, in *Goldberg* this Court held that due process requires that welfare recipients be given heightened procedural protections—including the opportunity to cross-examine adverse witnesses—before aid may be terminated. 397 U.S. at 268–70. Of course, the government is not required to terminate anyone's benefits merely because a proceeding for considering whether to do so has been instituted. Yet the fact that such a favorable outcome for the recipient is possible does not weaken the due process safeguards required, precisely because the potential deprivation—even though not certain to occur—is so severe. *See id.* at 263–64.

Similarly, in holding that a full evidentiary hearing was not required prior to the initial termination of disability benefits, this Court in *Mathews* nevertheless assessed the "private interest" factor in terms of the potential deprivation that the benefit recipient faced. *Mathews*, 424 U.S. at 341 ("As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular

decision is a factor to be considered in assessing the validity of any administrative decisionmaking process."). *See generally Santosky v. Kramer*, 455 U.S. 745, 759 (1982) (noting the significance of the private interest in a variety of "government-initiated proceedings to determine" whether to authorize a deprivation).

As the following chart reflects, decisions of many other lower courts are to the same effect:

Court	**Personal interest assessed according to potentially worst deprivation?**
Fifth Circuit	Yes[10]
Sixth Circuit	Yes[11]
Eighth Circuit	Yes[12]

[10] *See Davis v. Page*, 714 F.2d 512, 517 (5th Cir. 1983) (per curiam) (personal interest of parent in maintaining custody of child "is an extremely important one" despite possibility that parent will retain custody at conclusion of dependency hearing).

[11] *See United States v. Silvestre-Gregorio*, 983 F.3d 848, 854–55 (6th Cir. 2020) (personal interest of juvenile alien in avoiding deportation is "substantial" despite the fact that removal is not the inevitable result of a deportation hearing).

[12] *See Bliek v. Palmer*, 102 F.3d 1472, 1477 (8th Cir. 1997) (personal interest of food stamp recipient in not having to repay over-issuances is "vital" despite agency regulation guaranteeing continued food-stamp eligibility regardless of over-issuance liability).

Mich. Supreme Court	Yes[13]
Wash. Supreme Court	Yes[14]
Colo. Supreme Court	Yes[15]
Conn. Supreme Court	Yes[16]
N.J. Supreme Court	Yes[17]
N.C. Supreme Court	Yes[18]

[13] *See In re Sanders*, 852 N.W.2d 524, 529–30, 535 (Mich. 2014) (personal interest of parent in maintaining custody of child "cannot be overstated" despite possibility that parent's rights will not be terminated following a dispositional hearing).

[14] *See City of Bellevue v. Lee*, 210 P.3d 1011, 1013–14 (Wash. 2009) (personal interest of motorist in driver license is "substantial" despite possibility that license will not be suspended at conclusion of administrative hearing).

[15] *See C.S. v. People*, 83 P.3d 627, 636–38 (Colo. 2004) (personal interest of parent in maintaining parental rights is "extremely important" despite possibility that parental rights will not be terminated at conclusion of dependency hearing).

[16] *See Giaimo v. City of New Haven*, 778 A.2d 33, 54–55 (Conn. 2001) (personal interest of employer in avoiding liability for worker's compensation injury is "substantial" despite possibility that the compensation panel will rule for employer).

[17] *See Matter of Polk*, 449 A.2d 7, 14–16 (N.J. 1982) (personal interest of doctor in maintaining license to practice medicine is "substantial" despite possibility that license will not be revoked upon conclusion of disciplinary hearing).

[18] *See Wake County, ex rel. Carrington v. Townes*, 293 S.E.2d 95, 99–100 (N.C. 1982) (personal interest of defendant in civil paternity suit is "substantial" despite possibility that defendant will disprove paternity without assistance of counsel).

Cal. Court of Appeal	No[19]

Of course, administrative entities sometimes may lawfully employ summary procedures, even when substantial interests are at stake. But such minimal pre-deprivation process is only constitutional if the accused has a prompt and full post-deprivation remedy. *See, e.g.*, *Brock v. Roadway Exp., Inc.*, 481 U.S. 252, 266 (1987) (upholding summary procedure for temporary reinstatement of an alleged employee whistleblower because the employer was assured a post-deprivation hearing in front of "the administrative law judge, before whom an opportunity for complete cross-examination of opposing witnesses is provided"); *Dixon v. Love*, 431 U.S. 105, 109–10 (1977) (upholding summary procedure for driver license suspension in part because "as early as practical" afterwards the licensee was entitled to "a full evidentiary hearing"); *Mathews*, 424 U.S. at 349 (upholding summary procedure for termination of disability benefits in part because the claimant was "assure[d] a right to an evidentiary hearing . . . before the denial of his claim [became] final"); *Arnett v. Kennedy*, 416 U.S. 134, 142–46, 157–58 (1974) (upholding summary procedure for termination from federal civil service where fired employee would be entitled to a post-dismissal "evidentiary trial-type hearing"). Here, however, there is no comparable post-deprivation remedy. Instead, the penalty order recipient is limited to the closed-record and agency-friendly review standards of California administrative mandate. *See* App. A-12 to

[19] App. A-36.

A-13; B-8 to B-10. *See generally Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n*, 77 Cal. Rptr. 3d 432, 441 (Ct. App. 2008) (the reviewing court "may reverse [the Commission's] decision only if, based on the evidence before [the Commission], a reasonable person could not have reached the conclusion reached by it") (internal quotations omitted).

The court of appeal's decision significantly departs from decisions of this Court and other lower courts as to the employment of the *Mathews* "personal interest" factor. Review is therefore merited.

II.

Certiorari Should Be Granted To Resolve the Many Conflicts Created by the Decision Below as to the Required Procedural Protections For Those Who Face a Devastating Deprivation

The court of appeal concluded that a section 30821 penalty order proceeding does not require heightened procedural protections like cross-examination—the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970)—because a determination of liability and punishment generally will depend on documentary evidence and evaluative considerations. App. A-39 to A-40. In so holding, the court of appeal departed from the precedent of this Court and other lower courts by asking whether heightened protections would be valuable for the accurate resolution of *every point at issue* in a section 30821 hearing, as opposed to whether, as this Court and other courts have

instructed, they could be so to *at least some points at issue*.

To begin, the court of appeal gave no consideration at all to the presumption, employed by this Court and other lower courts, that heightened procedural protections are the rule, not the exception, when an accused faces potentially catastrophic consequences. Indeed, in "almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg*, 397 U.S. at 269. *See, e.g.*, *id*. at 269–71 (loss of welfare benefits); *Ching v. Mayorkas*, 725 F.3d 1149, 1157–59 (9th Cir. 2013) (visa petition to avoid removal); *Business Commc'ns, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374, 380–83 (8th Cir. 2013) (whistleblower complaint from former employee); *McNeill v. Butz*, 480 F.2d 314, 322–24 (4th Cir. 1973) (dismissal from federal employment); *Doughty v. Director of Revenue*, 387 S.W.3d 383, 387 (Mo. 2013) (revocation of driver license); *Tyree v. Evans*, 728 A.2d 101, 103–05 (D.C. 1999) (civil protection order); *Soc'y for Savs. v. Chestnut Estates, Inc.*, 409 A.2d 1020, 1025–27 (Conn. 1979) (deficiency judgment against mortgagor); *Carr v. Iowa Employment Sec. Comm'n*, 256 N.W.2d 211, 216 (Iowa 1977) (loss of unemployment benefits); *Smith v. Miller*, 514 P.2d 377, 385–88 (Kan. 1973) (school expulsion).

To be sure, "when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). But "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Id.* It is difficult to imagine a better example of an administrative action that "directly affect[s] the legal rights of individuals" and thus merits heightened procedural safeguards than a section 30821 penalty proceeding, which easily can—and in the Lents' case did—result in the imposition of millions of dollars in penalties.

The court of appeal dismissed the need for heightened protections because, in its view, a section 30821 proceeding will largely turn upon documentary evidence and evaluative considerations. App. A-39 to A-40. But neither this Court nor other lower courts have ever sanctioned such exceptions to enhanced procedural protections for proceedings like those established by section 30821, in which the accused risks financially crushing penalties and documentary evidence or evaluative considerations are not the *sole* focus of the proceeding.

As for the court of appeal's supposed "documentary evidence" carve-out from due process, this Court has repeatedly cautioned that heightened procedural protections are not made unnecessary simply because the proceeding may entail the review

of documentary evidence. *See Goldberg*, 397 U.S. at 269–70; *Greene v. McElroy*, 360 U.S. 474, 496 (1959). *Cf. Connecticut v. Doehr*, 501 U.S. 1, 14–15 (1991) (notice and hearing required prior to prejudgment attachment of real estate despite fact that many such attachments turn on simple disputes resolvable by documentary proof). Rather, those cases in which the Court has countenanced relaxed procedural safeguards have concerned administrative proceedings that focused on objective facts readily ascertainable by written evidence, *see, e.g.*, *Dixon*, 431 U.S. at 113 (traffic ticket records); *Mathews*, 424 U.S. at 344–45 ("routine, standard, and unbiased medical reports") (citation omitted), or that presented unusual safety or institutional circumstances justifying abnormally summary process, *see, e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 567–68 (1974) (prison disciplinary hearings); *Goss v. Lopez*, 419 U.S. 565, 577–84 (1975) (school suspensions). None of these considerations is pertinent to a Commission penalty order proceeding. For, in *every* such case, the Commission is required to take into account such non-documentary factors as the "nature, circumstance, extent, and gravity of the violation," the "sensitivity of the resource," the violator's "degree of culpability," as well as "other matters as justice may require," Cal. Pub. Res. Code § 30820(c)(1), (3), (5), considerations that are far from the "ordinarily uncomplicated matters that lend themselves to documentary proof," *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609 (1974).[20] Moreover, the disputes at issue in Coastal Act penalty

[20] The relevance of such non-documentary factors is amply displayed by the Lents' case. *See supra* note 9. *Cf.* App. A-39 (conceding that the liability phrase of a section 30821 proceeding "may depend on the testimony of a percipient witness").

order proceedings have little to do with the special penological or pedagogical interests that have otherwise justified relaxed procedural protections for the accused.

As for the court of appeal's supposed "evaluative considerations" exception, it is true that this Court has sanctioned summary procedure for administrative proceedings that turn upon "subjective and evaluative" considerations rather than "typical factual questions." *Bd. of Curators v. Horowitz*, 435 U.S. 78, 88–91 (1978) (student dismissal for poor academic performance). *Accord Greenholtz v. Inmates*, 442 U.S. 1, 13–16 (1979) (parole determination); *Parham v. J. R.*, 442 U.S. 584, 608–09 (1979) (commitment of child for mental health treatment). But unlike the court of appeal below, this Court has never approved the abandonment of procedural protections like the right of cross-examination where, as here, only *part* of the administrative proceeding may be evaluative.[21] *See Bd. of Curators*, 435 U.S. at 90 (hearing not required prior to dismissal for inadequate academic performance because "[s]uch a judgment is *by its nature* . . . subjective and evaluative") (emphasis added). *Cf. Davis v. Mann*, 882 F.2d 967, 973–75 (5th Cir. 1989) (heightened safeguards not required prior to dismissal from dental residency program because "[s]uccessful completion of the residency program *depends upon* subjective evaluations") (emphasis added); *Marlboro Corp. v. Ass'n of Indep. Colls. & Schs., Inc.*, 556 F.2d 78, 82 (1st Cir. 1977) (school accreditation did not require "a full-

[21] *See* App. A-40 n.10 (conceding that the penalty phase of a section 30821 hearing may require the Commission to consider "factors [that] depend more on contestable facts").

blown adversary hearing" because the "inquiry was broadly evaluative *in nature*") (emphasis added); *Barros v. Barros*, 72 A.3d 367, 377 (Conn. 2013) (no right to have counsel present for a preliminary child custody evaluation because "it is an *intrinsically* evaluative . . . process") (emphasis added).

Thus, review is merited to resolve the conflicts created by the court of appeal's ruling below concerning when heightened procedural protections can be dispensed with under the second *Mathews* factor merely because the administrative decision *may* only partly involve documentary evidence or evaluative considerations.

III.

Review Is Needed To Provide the Lower Courts with Guidance as to How To Evaluate Whether a Fine Is "Grossly Disproportional" Under the Excessive Fines Clause

Protection against excessive fines "has been a constant shield throughout Anglo-American history," one that, as codified in the Eighth Amendment, is "both fundamental to our scheme of ordered liberty and deeply rooted in this Nation's history and tradition." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (internal quotations omitted). The purpose of the Excessive Fines Clause is "to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609–10 (1993). A punishment—like the administrative penalty levied against the Lents —is unconstitutionally excessive if it is "grossly disproportional" to the offense. *Bajakajian*, 524 U.S. at 324. To determine whether such a punitive levy is

grossly disproportional, this Court in *Bajakajian* looked to the respondent's culpability, the relationship of the penalty to the harm, and the penalties authorized for similar conduct. *See id*. at 337–40.

In rejecting the Lents' excessive fines challenge to the $4.185 million administrative penalty order against them, the court of appeal concluded that the harm caused by the Lents' offense—failing to take action to remove alleged physical impediments to the development of a public access easement which were put in place by the Lents' predecessors-in-interest—supported a multi-million-dollar penalty. *See* App. A-58 to A-62. The court explained that no public access currently exists to the portion of the beach near the Lents' property, and that "the state places significant value on the public's right to access the coast." App. A-61.

But devoid from the court of appeal's decision is any attempt to assess the Lents' alleged wrongdoing and harm in a *comparative* context. Although the court considered the denial of public access to the beach to threaten a "significant" public value, one would be hard-pressed to find any legitimate governmental purpose that could not be described as "significant." For that reason, this Court has underscored that a fine may be unconstitutionally excessive *despite* a legislative determination that the underlying illegality is part of a class of activity that threatens the public health or welfare. *See Bajakajian*, 524 U.S. at 328–29, 338, 344 (forfeiture of respondent's $357,144 unconstitutionally excessive, despite the federal government's contention that it

had "an overriding sovereign interest in controlling what property leaves and enters the country," in part because the respondent was no "money launderer, [ ] drug trafficker, or [ ] tax evader"). As the following chart reflects, the same is true of many other lower courts:

Court	**Fine's alleged excessiveness is assessed in comparative context?**
Second Circuit	Yes[22]
Seventh Circuit	Yes[23]
Ninth Circuit	Yes[24]
Mass. Sup. Jud. Court	Yes[25]

[22] *von Hofe v. United States*, 492 F.3d 175, 191 (2d Cir. 2007) (forfeiture of wife's one-half interest in drug house unconstitutionally excessive, despite "Congress's judgment regarding the pernicious effects caused by illicit drugs," because her relationship to her husband's illegal drug activity was minimal).

[23] *United States v. Abair*, 746 F.3d 260, 268 (7th Cir. 2014) (forfeiture of home for "an unusually minor violation of the structuring statute not tied to other wrongdoing" was likely to be unconstitutionally excessive).

[24] *United States v. 3814 NW Thurman Street, Portland, Or., A Tract of Real Property*, 164 F.3d 1191, 1196–97 (9th Cir. 1999) ("The culpability of the offender should be examined specifically, rather than examining the gravity of the crime in the abstract.").

[25] *Pub. Employees Retirement Admin. Comm'n v. Bettencourt*, 47 N.E. 3d 667, 678–81 (Mass. 2016) (forfeiture of police officer's entire $700,000 pension for conviction of 21 counts of

W. Va. Supreme Court	Yes[26]
N.Y. Court of Appeal	Yes[27]
D.C. Court of Appeals	Yes[28]
Utah Supreme Court	Yes[29]

unauthorized computer access resulting in "a breach of the public trust" unconstitutionally excessive because the harm "was relatively small as compared to . . . other cases").

[26] *Dean v. W. Virginia*, 736 S.E.2d 40, 51–52 (W. Va. 2012) (forfeiture of a home valued at $100,000 for having made one sale of illegal drugs valued at $600 would be unconstitutionally excessive).

[27] *County of Nassau v. Canavan*, 802 N.E. 2d 616, 622 (N.Y. 2003) (although some driving offenses could justify forfeiture of an automobile, "the forfeiture of an automobile for a minor traffic infraction such as driving with a broken taillight or failing to signal would surely be 'grossly disproportional to the gravity of a defendant's offense'") (quoting *Bajakajian*, 524 U.S. at 334).

[28] *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 566 (D.C. 1998) (forfeiture of vehicle used in solicitation of prostitute unconstitutionally excessive, despite the fact that "the impact of prostitution upon the neighborhoods within which it is practiced is of great civic concern," because the owner could "not be made to bear grossly disproportionate responsibility for the problem of prostitution in the District").

[29] *State v. Real Property at 633 East 640 North, Orem, Utah*, 994 P.2d 1254, 1260–61 (Utah 2000) (forfeiture of home used in connection with drug dealing unconstitutionally excessive, despite "the broad-scale effect of drug trafficking on society," because, "[m]easured by any standard, [the homeowner's] drug operation was small").

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Indeed, it would be contrary to common sense and common moral feeling to equate—or even to put within an order of magnitude—(i) the Lents' alleged wrongdoing of causing a delay in the development of a public accessway to a small stretch of beach in a state that has over 850 existing public accessways along its 1,100-mile coast line,[31] with (ii) wrongdoing like government contracting fraud, toxic dumping, deceitful advertising, and similarly grave *mala in se* that directly harms the public health, safety, or welfare, and has often been punished with steep fines. *Cf. United States v. Bikundi*, 926 F.3d 761, 795–96 (D.C. Cir. 2019) ($40 million forfeiture for "sprawling" Medicaid fraud); *United States v. Bennett*, 986 F.3d 389, 399–499 (4th Cir. 2021) ($14 million forfeiture for bank and securities fraud that "devastat[ed] generations of investors around the country"); *Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) ($1.345 million for 10-year unexplained delay in cleaning up PCB-contaminated soil pile); *Maher v. Retirement Bd. of Quincy*, 895 N.E.2d 1284, 1291–92 (Mass. 2008) (forfeiture of $576,000 pension for burglary of city hall and theft of personnel file); *State v. Izzolena*, 609 N.W.2d 541, 544, 551 (Iowa 2000) ($150,000 mandatory restitution for conviction of involuntary manslaughter).

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[30] *See* App. A-61 to A-62.

[31] Cal. Coastal Comm'n, Coastal Access Program, https://www.coastal.ca.gov/access/accessguide.html (last visited Oct. 6, 2021).

The court of appeal's failure to properly qualify the harm and the alleged violation highlights a more fundamental conflict-producing flaw in the court's analysis: not taking account of the distinction between acts and omissions. The Lents were punished the full $11,250 per day authorized by section 30821 for the latter, not the former. *See* AR 505 (rev. Comm'n staff rep.). But the law has always recognized a meaningful difference between malfeasance and nonfeasance. *See, e.g.*, Restatement (Third) of Torts: Phys. & Emot. Harm § 37 (Am. L. Inst. 2012) ("No Duty of Care with Respect to Risks Not Created by Actor"); *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957) (holding unconstitutional a felon registration ordinance in part because it regulated "conduct that is wholly passive . . . unlike the commission of acts"). And that distinction is one which, unlike the court of appeal below, this Court and others have carried over into the excessive fines context. *See Bajakajian*, 524 U.S. at 337–38 (nature of the offense as merely "a willful failure to report the removal of currency from the United States" that was "unrelated to any other illegal activities" supported determination that the currency's forfeiture was unconstitutionally excessive); *von Hofe*, 492 F.3d at 191 (forfeiture of wife's one-half interest in home unconstitutionally excessive because her "offensive conduct boil[ed] down to her joint ownership" yet she was "being punished as if she were distributing drugs"); *Wilson v. Comm'r of Rev.*, 656 N.W.2d 547, 555 (Minn. 2003) (imposition of employee's tax liability on employer company and its owner unconstitutionally excessive in part because "neither [the owner] nor [the employer company] participated in the creation of the underlying tax liability").

Review is therefore merited to resolve the conflicts created by the decision below concerning whether inaction that is unrelated to any activity harmful to public health or safety may nevertheless merit punitive fines in the millions of dollars. By answering these particular questions raised by the Lents' case, the Court can also provide much-needed general guidance on how to employ *Bajakajian*'s "grossly disproportional" standard. *Cf.* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 845–46 (2013) (each federal circuit "has had to develop its own version of the *Bajakajian* . . . test"); Wesley Hottot, *What is an Excessive Fine? Seven Questions to Ask After* Timbs, 72 Ala. L. Rev. 581, 587 (2021) ("More judicial engagement is urgently needed."). The Lents' case represents an excellent vehicle for that task. Their multi-million-dollar administrative penalty had little to do with any actual harm to the public, but was assessed mainly to punish them for their vigorous defense and to make examples of them to compel prompt obeisance from other accused property owners.[32] Such an excess of

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[32] *See, e.g.*, AR 4266 (Comm'r Shallenberger) (arguing for a substantial increase in the staff's recommended fine to "reflect the time and energy and staff resources that have gone in[to]" prosecuting the Lents, while referencing the many letters sent by the Lents through counsel asserting that they were not in violation of the Act); AR 4258 (Comm'r Turnbull-Sanders) ("[L]ooking at the prior history of violations . . . staff went into great detail in looking at how many letters, how many points of contact, how many times there were meetings with the respondent that were to no avail."); AR 4277 (Comm'r Bochco) ("The degree of culpability is obviously very high [because the Lents kept] sending more—more and more legal rhetoric about, 'Oh, gee, is this—you know, is this really the law?'").

punitive zeal is precisely what the Excessive Fines Clause was meant to guard against. *See Austin*, 509 U.S. at 610.

IV.

Whether an Agency May, Contrary to Typical Administrative Practice, Levy Multi-Million-Dollar Fines Using Only Summary Procedure, Is an Important Issue Worthy of This Court's Review

Even prior to the enactment of section 30821, the Commission's enforcement power was unparalleled. *See* Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. Rev. 1079, 1080 (2004) ("[T]he California Coastal Commission [is] arguably the most powerful land use authority in the nation . . . ."). Since that power was made gargantuan through the grant of penalty order authority, the Commission and its staff have readily employed it to deprive landowners like the Lents of millions of dollars. *See* Cal. Coastal Comm'n, *Report to California Legislature on Implementation of Coastal Commission Administrative Penalty Authority From 2015-2018*, at 20 (2019) (through 2018, the Commission had issued just short of ten orders, with an average penalty of about $1 million). That, however, is a pittance compared to what the Commission will be able to extract from hapless coastal property owners in light of the California Legislature's recent and dramatic augmentation of the penalty order power's reach. Under newly enacted legislation, the Commission may unilaterally impose penalties—using its summary procedure—for violation of *any* provision of the Coastal Act, not just

its public access provisions. *See* S.B. 433 (Allen), 2021-2022 Reg. Sess. (Cal. 2021), *effective* Jan. 1, 2022 (enacting Cal. Pub. Res. Code § 30821.3(a)).

This Court's corrective review is urgently needed. There is no reason to believe that the Lents' ordeal will be the exception.[33] The Commission has a deep-rooted habit of using its crippling regulatory power with scant regard for the property rights of those citizens who tangle with it. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837–39 (1987) (rejecting a Commission permitting exaction policy as an "out-and-out plan of extortion" (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14 (N.H. 1981)); *Bowman v. Cal. Coastal Comm'n*, 179 Cal. Rptr. 3d 299, 303–04 (Ct. App. 2014) (rejecting Commission's attempt to use administrative collateral estoppel to impose an easement in violation of *Nollan*). *See generally* J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247 (2004).

This Court can check the Commission's unbridled enforcement power and strike a blow for constitutional liberties without threatening normal

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[33] But it may be the Court's only opportunity to review the Coastal Act's administrative penalty regime. For no rational property owner will now want to run the risk of contesting a proposed penalty only to be saddled with a quadrupled (or worse) fine. Instead, an accused will effectively be compelled to agree to a "consent" order, thereby waiving the right to contest that order. *See, e.g.*, Consent Cease & Desist Order No. CCC-18-CD-03, Consent Restoration Order CCC-18-RO-02, at 17 (Aug. 29, 2018) (requiring waiver of respondents' right of judicial review), *available at* https://bit.ly/3Fqltez.

agency practice in other jurisdictions. Although penalty authority is common among administrative agencies, no entity other than the Coastal Commission enjoys (for now) such unchecked penalty power as that granted by the Coastal Act's penalty order provision. For example, in federal practice, an accused who faces a substantial administrative penalty under the Clean Water Act, 33 U.S.C. § 1319(g), the Clean Air Act, 42 U.S.C. § 7413(d)(2), the Endangered Species Act, 16 U.S.C. § 1540(a)(2), the Magnuson Fisheries Act, 16 U.S.C. § 1855(a), the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609(b)(5), or the Toxic Substances Control Act, 15 U.S.C. § 2615(a)(2), is entitled to a formal adjudicatory hearing, including the right to present and request evidence under oath to a neutral administrative law judge, to supplement with rebuttal evidence, and to cross-examine witnesses. *See* 5 U.S.C. §§ 554, 556(c)–(d).

This Court's review is therefore needed not just to protect the freedoms of those millions of citizens who dwell within or visit the Coastal Act's coastal zone, but also the freedoms of Americans in other jurisdictions whose legislatures or administrative agencies may be tempted to follow the Commission's bad example.

CONCLUSION

The petition for writ of certiorari should be granted.

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PAUL J. BEARD II
FisherBroyles LLP
4470 W. Sunset Blvd.,
Suite 93165
Los Angeles, CA 90027
Telephone: (818) 216-3988
paul.beard@fisherbroyles.com

DAMIEN M. SCHIFF*
**Counsel of Record*
JOSHUA P. THOMPSON
JEREMY TALCOTT
Pacific Legal Foundation
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
DSchiff@pacificlegal.org
JThompson@pacificlegal.org
JTalcott@pacificlegal.org

Counsel for Petitioners