No. 21-563

In the
Supreme Court of the United States

WAREN 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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the guaranty of due process of law before imposition of punitive sanctions. Amicus has participated in cases before this Court raising this issue including *Sackett v. Environmental Protection Agency*, 566 U.S. 120 (2012).

SUMMARY OF ARGUMENT

This Court has ruled that the Excessive Fines Clause of the Eighth Amendment applies to civil forfeiture proceedings, even though it textually applies only to criminal proceedings. Yet the Court has also ruled that the Double Jeopardy Clause does not apply to civil penalty proceedings. This confusion is created, in part, by the proliferation of new civil punitive actions. The courts are left to wonder where civil actions designed to punish fit into the scheme of due process protections explicitly set out in the Bill of Rights.

At the time of the founding, the legal system generally recognized two types of actions: civil, for use in disputes between private parties in order to win a remedy for an injury, and criminal, to hold an individual liable for violation of a public right. Recognizing

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[1] All parties were notified of and have consented to the filing of this brief. Respondents waived objections to late notice. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

these two branches of law, the initial amendments to the Constitution provided a general right to due process of law, but specifically recognized the right to jury trials in civil and criminal cases and further recognized additional due process protections in criminal cases including the right to confront adverse witnesses and to compel testimony.

With the advent of the administrative state, however, what was once treated as a criminal violation has been shifted to civil penalties adjudicated by administrative tribunals. Few, if any, of the rights secured by the Bill of Rights apply in these tribunals. The purpose of hearings, like the one at issue here, is to determine whether an individual has violated a public right, and if so to assign a punishment. Yet, there is no right to cross-examine witnesses, no right to compel testimony, and no right to have a jury determine disputed issues. Both Congress and state legislatures have found a much less expensive and less burdensome way to impose criminal-style penalties. This Court should grant review to clarify that neither Congress nor state legislatures may circumvent the specific due process protections of the Sixth Amendment by assigning to an administrative agency the adjudication of the question of whether a public right has been violated and, if so, what punishment should be imposed.

REASONS FOR GRANTING THE WRIT

I. The Specific Due Process Protections of the Sixth Amendment Were Understood to Apply to Proceedings at which the Government Seeks to Impose Punishment.

The Declaration of Independence lists as one of the grounds for separation from England "depriving us in many cases, of the benefits of trial by jury." 1 Stat. 1. This was one of the complaints raised against the Stamp Act of 1765. John Adams noted that the "most grievous Innovation" of that law was assignment of the cases to the Courts of Admiralty where there was no right to trial by jury. John Adams, Instructions of the Town of Braintree on the Stamp Act, 10 Oct. 1765 *reprinted in* 5 THE FOUNDERS CONSTITUTION at 251. This denial of trial by jury for tax fines ran counter to what the founders considered their "inherent and inviolable right." Stamp Act Congress, Declaration of Rights, 19 Oct. 1765 *reprinted in* 5 THE FOUNDERS CONSTITUTION at 251.

William Blackstone argued that the right to trial by jury "was the glory of English law." Elise E. Wathall, *Constitutional Law - The Practical and Procedural Implications of Jury Misconduct in the Third Circuit*, 39 Vill. L.Rev. 1005 (1994). It should be no surprise, therefore, that the colonist in America were especially concerned when they were denied that right. The Continental Congress specifically identified this right of common law as one belonging to the people living in the Colonies. Continental Congress, Declarations and Resolves, 14 Oct. 1774, *reprinted in* 5 THE FOUNDERS CONSTITUTION at 258. This right was so important that it was included in the declaration of rights

adopted by the new states. *See, e.g.,* Virginia Declaration of Rights, § 8 (1776) *reprinted in* 5 THE FOUNDERS CONSTITUTION at 259; Delaware Declaration of Rights and Fundamental Rules, § 14 (1776) *reprinted in* 5 THE FOUNDERS CONSTITUTION at 259; Vermont Constitution of 1777, ch. 1, art. 10 *reprinted in* 5 THE FOUNDERS CONSTITUTION at 259.

When the new Constitution was sent to the states for ratification, one of the concerns is that it did not include a right to trial by jury or a right to confront adverse witnesses. For instance, the Massachusetts ratifying convention recorded a debate noting the lack of such protections and pointing out that Congress would have the power to set criminal procedure, free of any "constitutional check." Debate in Massachusetts Ratifying Convention, 30 Jan. 1788 *reprinted in* 5 THE FOUNDERS CONSTITUTION at 260. Thus, in framing the Bill of Rights, the Founders wanted to ensure that Congress could not deprive citizens of their common law rights to trial by jury and the right to confront adverse witnesses. The Impartial Examiner I, Virginia Independent Chronicle *reprinted in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION at 462.

William Blackstone's Commentaries on the Laws of England, the touchstone for the founding generation's understanding of law and government (*see Alden v. Maine*, 572 U.S. 706, 719 (1999)), divided law into two categories: civil and criminal (William Blackstone, COMMENTARIES ON THE LAW OF ENGLAND, Book III, ch. 1. Using these categories, the founders set out to establish some minimum requirements for due process and preserve the rights to trial by jury and con-

frontation of adverse witnesses. The Seventh Amendment guarantees a right to a jury trial in civil actions at law. U.S. Const., Amend. VII; *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708-09 (1999). The Sixth Amendment provides for trial by jury in criminal cases and adds the right to compel the testimony of witnesses, the right to counsel, and the right to confront adverse witnesses. U.S. Const., Amend. VI; *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002).

The founding generation did not anticipate the proliferation of administrative law at both the state and federal level. Nonetheless, it is clear that the founders did not give Congress (or state legislatures) the power to do away with the right to trial by jury or other due process protections in the Sixth Amendment. The entire purpose of enacting a Bill of Rights was to ensure that these rights could not be waived by the political branches. Yet that is what has happened in this case. California has granted an administrative agency, the California Coastal Commission, the power to try landowners for violations of state laws and regulations and then impose punitive fines in the event the landowner is found guilty. There is no right to jury, no right to question adverse witnesses, no right to require evidence under oath. This lack of procedure is freighted with all the defects that contributed to the Declaration of Independence and ultimately led to the adoption of the Sixth Amendment to the United States Constitution. This Court should grant review to determine that state or federal proceedings that impose punitive sanctions for violation of state or federal law are governed by the Sixth Amendment.

II. The Court Should Grant Review to Return to the Original Understanding that the Political Branches Cannot Waive the Protections of the Sixth Amendment.

By a gradual process, decisions of this Court have vested the legislative branches with authority to cancel many of the procedural protections that the founding generation included in the Bill of Rights. In *NLRB v. Jone & Laughlin Steel Corp*., 301 U.S. 1 (1937), this Court ruled that the Seventh Amendment right to a jury trial did not apply to an order of the NLRB ordering payment of backpay. *Id*. at 48. The basis of the ruling was that the NLRB order for money damages was "an incident to equitable relief" rather than a suit at common law. Thus, by its terms, the Seventh Amendment did not apply. *Id*. That text-based rule, however, was ultimately broadened into a rule that the right to a jury trial was never applicable to an administrative proceeding. "*Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Curtis v. Loether*, 415 U.S. 189, 194 (1974); *see Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455 (1977). Congress was given free rein to create new "statutory rights" free from the jury trial right that the founders sought to preserve in the Seventh Amendment. Committing these cases to administrative adjudication is significant because the rulings of the nonjury administrative agency are entitled to issue preclusion effect in subsequent judicial proceedings. *B & B Hardware, Inc. v. Hargis Industries, Inc.*, 575 U.S. 138, 140 (2015).

This Court has also ruled that Congress is in control of whether the protections of Fifth Amendment will apply when punitive remedies are sought. In an earlier case, the Court had ruled that the question of whether the Double Jeopardy Clause of the Fifth Amendment applied to a subsequent civil action depended on whether the civil penalty constituted "punishment." *U.S. v. Halper*, 490 U.S. 435, 436 (1989), *abrogated by Hudson v. U.S.*, 522 U.S. 93 (1997). In *Halper*, the Court ruled that the "multiple punishment" bar of the Double Jeopardy Clause applied even in civil proceedings where the character of the civil sanctions is punitive. *Id*. at 447.

Halper was overruled, however, in *Hudson v. U.S.* There, this Court abandoned the task of determining whether monetary sanctions imposed in an administrative proceeding were "punitive" for purposes of the Double Jeopardy Clause. Instead, the Court left the question up to Congress. Double jeopardy was not implicated so long as Congress did not intend the administrative penalty to be "criminal." *Hudson*, 522 U.S. at 99. The Court starts its analysis by determining whether Congress expressed "a preference" as to whether the penalty should be called criminal or civil. *Id*. The legislative branch was thus put in charge of whether the protections of the Fifth Amendment would apply to a civil punishment.

This runs counter to the reason for including these protections in the Bill of Rights. As noted above, the founding generation did not trust the new Congress and feared that it might take away rights. Thus, they demanded the amendments to the Constitution that became known as the Bill of Rights to restrict Congress's power.

The Court has taken a different approach to the Excessive Fines Clause of the Eighth Amendment. Like the Double Jeopardy Clause of the Fifth Amendment and the jury trial right and Confrontation Clause of the Sixth Amendment, the protection against excessive fines appears to be focused on criminal proceedings. Thus, this Court declined to apply the Excessive Fines Clause to awards of punitive damages in cases between private parties. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 262, 264 (1989). The Court held open the possibility, however, that the Eighth Amendment could apply where the government prosecutes the action or receives a portion of the damages awarded. *Id.* at 264.

This was the case in *U.S. v. Bajakajian*, 524 U.S. 321 (1998), where the Court held that the Excessive Fines Clause applied to forfeiture of money that the defendant had failed to report to Customs Agents. The forfeiture was part of a criminal proceeding and this Court easily concluded that the forfeiture "constitutes punishment." *Id.* at 328. The Court rejected the argument that the forfeiture had a remedial purpose of "deterrence." Deterrence is a goal of punishment – not compensation. *Id.* at 329.

More recently, this Court ruled that the Excessive Fines Clause was incorporated against the states. *Timbs v. Indiana*, 139 S.Ct. 682, 687 (2019). Importantly, *Timbs* did not involve a criminal proceeding. Instead, the case concerned a civil *in rem* forfeiture proceeding. *Id.* at 689-90. Nonetheless, the Court had no problem finding that such forfeitures fall within the ambit of the Eighth Amendment "when they are at least partially punitive." *Id.* at 689. The

Excessive Fines Clause limits the power of the state to impose a fine "as punishment for some offense." *Id.* at 687 (internal quotation marks removed). The Court should grant review in this case to apply the same reasoning to the protections of the Sixth Amendment and to return to a jurisprudence of broad application of the Bill of Rights. Those protections should apply when the state institutes proceedings to punish an individual.

Here, the purpose of the hearing before the state administrative body was to determine whether the petitioner violated a state law and, if so, what punishment should be imposed. There is no doubt that the massive financial penalty was meant to be a punishment. As noted in the petition, one of the commissioners on the state board justified the massive penalty saying: "we don't want to be in a position … rewarding … applicants that have been fighting us." It was not only meant to punish, but it meant to make the petitioners an example to other homeowners who might want to protect their property rights.

The Court should grant review to determine that actions meant to determine whether law has been violated and, if so, to set a punishment for that violation must be governed by the provisions of the Sixth Amendment.

CONCLUSION

The founding generation included the procedural protections of the Fifth, Sixth, Seventh, and Eighth Amendments in the Constitution to deprive the political branches of the power to impose punishments free of due process of law. The Court should grant the petition in this case to rule that assignment of an action to an administrative agency does not cancel those constitutional protections.

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