No. 21-563

In the Supreme Court of the United States

WARREN M. LENT, *et al.*,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION SEVEN

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners blocked a public-access easement over their beachfront property in Malibu, preventing the construction of an accessway across the easement and thereby effectively excluding the public from a lengthy stretch of coastline in violation of the California Coastal Act. Over a period of nine years, they refused repeated requests by respondent California Coastal Commission to remove the unpermitted structures blocking the easement. The Commission served petitioners a notice of the alleged violation and its intent to impose civil penalties, as authorized by the Act. In accordance with the Commission's hearing procedures, petitioners submitted a lengthy written defense and participated in a public hearing represented by counsel. Among other protections, the procedures also afforded petitioners the ability to submit questions to be asked of other speakers at the hearing, which petitioners declined to do. Following the hearing, the Commission imposed an administrative civil penalty of $4.185 million. The questions presented are:

1. Whether the Commission's procedures for conducting civil-penalty hearings facially violate the Due Process Clause of the Fourteenth Amendment.

2. Whether, under the particular circumstances of this case, the penalty imposed by the Commission violates the Excessive Fines Clause of the Eighth Amendment.

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STATEMENT

1. In 1976, the California Legislature enacted the Coastal Act to serve as "a comprehensive scheme to govern land use planning" in the State's "coastal zone." *Yost v. Thomas*, 36 Cal. 3d 561, 565 (1984).[1] The Act seeks to promote a number of legislative policies, which include protecting the State's "natural and scenic resources," Cal. Pub. Res. Code § 30001(b), and maximizing "public access to and along the coast and . . . public recreational opportunities" in a manner "consistent with sound resources conservation principles and constitutionally protected rights of private property owners," *id.* § 30001.5(c). The Act requires any property owner wishing to undertake any development within the coastal zone to obtain a "coastal development permit." *Id.* § 30600(a). Respondent California Coastal Commission is the primary state agency responsible for implementing the Act. *Id.* § 30330.

The Commission may issue a cease-and-desist order to any person or entity that undertakes development without a permit or in violation of the terms of a permit. Cal. Pub. Res. Code § 30810. The Commission may also initiate an action in superior court to recover civil penalties for a violation of the Act or of a cease-and-desist order. *Id.* §§ 30805, 30820, 30821.6. And under certain circumstances, the Commission may impose an "administrative civil penalty" for a "violation of the public access provisions" of the Act. *Id.* § 30821(a).

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[1] The "coastal zone" generally consists of the strip of land extending inland 1,000 yards from the mean high-tide line, though the zone is often narrower "in developed urban areas." Cal. Pub. Res. Code § 30103(a).

The Legislature carefully defined and limited the Commission's authority to issue such civil penalties. In setting a penalty, the Commission must consider a variety of factors, including (among others) the "nature, circumstance, extent, and gravity of the violation." Cal. Pub. Res. Code § 30820(c)(1); *see id.* § 30821(c). The maximum amount of any penalty the Commission may impose is $11,250 "for each day the violation persists," up to five years. *Id.* § 30821(a); *see id.* § 30820(b). In certain circumstances, the Commission lacks the authority to issue penalties at all, even if a violation has occurred. For example, penalties "shall not be assessed if the property owner corrects the violation . . . within 30 days of receiving written notification from the [C]ommission regarding the violation." *Id.* § 30821(h). More generally, an "unintentional, minor violation[]" that causes only "de minimis harm" cannot give rise to a penalty so long as "the violator has acted expeditiously to correct the violation." *Id.* § 30821(f).

The Act and the Commission's regulations establish a procedural framework for the issuance of cease-and-desist orders and civil penalties. The Commission may commence a proceeding by providing the alleged violator with a written notice identifying the relevant conduct and "an explanation of the basis" of the Commission's belief that the conduct is unlawful. Cal. Code Regs. tit. 14, § 13181(a). The alleged violator must be afforded at least 20 days to submit a written "statement of defense" to the charges. *Id.* The Commission must then conduct a public hearing and provide written notice in advance of the hearing "to all affected persons." Cal. Pub. Res. Code § 30810(c); *see id.* § 30821(b); Cal. Code Regs. tit. 14, § 13182. The Commission must distribute its staff's report on the alleged violation "within a reasonable time to assure

adequate notification prior to the scheduled public hearing." Cal. Code Regs. tit. 14, § 13059.

At the hearing, Commission staff must summarize the investigation and proposed findings. Cal. Code Regs. tit. 14, § 13185(c). The alleged violator may present argument and evidence in response, including material that could not have been included in the statement of defense. *Id.* § 13185(d). Formal rules of evidence do not apply, but the Commission may consider only evidence that is "relevant" and "is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." *Id.* § 13065; *see id.* § 13186. The regulations do not provide for cross-examination of speakers by the alleged violator, but any person or entity, including an alleged violator, may submit questions for the Commission to pose to any speaker. *Id.* § 13185(a). And the Commission's routine practice is to allow alleged violators to reserve time for rebuttal.

Any party aggrieved by a "decision or action" of the Commission, including a cease-and-desist order or administrative civil penalty order, may seek judicial review by filing a petition for writ of mandamus in superior court. Cal. Pub. Res. Code § 30801.[2] The court may set aside the Commission's action on one of several enumerated grounds, including that the Commission exceeded its statutory authority, that there was not "a fair trial," that there was a "prejudicial abuse of discretion," or that the Commission's findings are "not supported by the evidence." Cal. Code Civ. Proc. § 1094.5(b).

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[2] In California, mandamus is the principal mechanism for seeking judicial review of agency actions. *See, e.g.*, 43 Cal. Jur. 3d *Mandamus & Prohibition* § 29; *Beach & Bluff Conservancy v. City of Solana Beach*, 28 Cal. App. 5th 244, 258-259 (2018).

2. Petitioners own beachfront property along Las Flores Beach in Malibu, California, which they purchased subject to a preexisting public-access easement on the eastern side of the property. Pet. App. A6; *see id.* at B20. Petitioners have never disputed the validity of that easement (which was duly noticed and recorded), nor have they asserted that they lacked notice of it when they purchased the property. *See id.* at A6-A8.

It is also undisputed that, apart from that easement, "there is no public access to the beach" that abuts petitioners' property. Pet. App. A61. The nearest public coastal access points are at neighboring beaches 1.7 miles west and 1 mile east of petitioners' property, *id.* at B47, and lateral access along the shore from those beaches to Las Flores Beach is generally not possible. *See* Administrative Record (AR) 3022.

Notwithstanding the easement, the prior owner of the property had built a wooden deck and staircase in the easement area, as well as a fence and gate blocking public access from the road. Pet. App. A6. The Commission did not issue a permit or otherwise approve any of these structures. *Id.* In 1993, the California State Coastal Conservancy (the state agency that held the easement) sent the prior owner a letter observing that the gate blocked access and asking that the owner either remove the gate or seek the Conservancy's permission to keep it in place until the Conservancy was prepared to construct an accessway from the road

down to the beach, allowing the public to use the easement. *Id.* at A7-A8.[3] There is no indication in the record that the prior owner took any action in response to that letter. *Id.* at B17.

Petitioners purchased the property in 2002, and since then have operated it as a vacation rental. Pet. App. A8, B17-B18; AR 769-785.[4] In 2007, the Commission sent petitioners a letter informing them that the unpermitted structures blocking the easement violated the Coastal Act. Pet. App. A8. The Commission asked petitioners to remove the structures, but they refused to do so. *Id.*

In 2008, the Conservancy hired a contractor to conduct a survey related to building an accessway to open the easement to the public. Pet. App. A8. In 2010, an architectural firm completed conceptual plans for the accessway. *Id.* Between 2010 and 2016, the Commission repeatedly asked petitioners to remove the unpermitted structures and proposed a variety of potential settlement options. *Id.* at A9, B20-B27; *see, e.g.*, AR 797-805, 821-823, 826-828. Petitioners refused. Pet. App. A9, B20-B27; *see, e.g.*, AR 786-796, 809-817, 824-825. Indeed, petitioners refused even to agree to remove the deck and staircase once the Conservancy was prepared to begin construction on an accessway. Pet. App. B23-B24; *see* AR 825, 831-832.

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[3] Because of the topography of the property, public use of the easement to access the beach would require construction of an accessway. Pet. App. A8.

[4] Petitioners charged an average rate of more than $1,000 per night for the vacation rental and their online rental listing advertised a "private beach." AR 4100-4104, 4153-4154.

As a result, the Conservancy and its contractor were unable to build an accessway and open the easement to the public. Pet. App. B22; AR 956-962, 1187-1192. The Conservancy attempted to develop a plan for the accessway with the unpermitted structures intact, but determined that it was infeasible. AR 960. And petitioners' refusal to commit to removing the structures prevented the Conservancy from developing detailed plans for the accessway. *Id.*

In June 2014, shortly after the Legislature enacted Public Resources Code Section 30821, the Commission informed petitioners that their conduct could result in civil penalties of up to $11,250 per day under that statute. Pet. App. A9. The Commission advised petitioners to resolve the violation before penalties began to accrue. *Id.* at B24; AR 823. Petitioners again refused to do so. Pet. App. B24; AR 824-825. In September 2015, the Commission served them with a notice of intent to issue a cease-and-desist order and to impose civil penalties. Pet. App. A9; AR 850-862. The notice also informed petitioners of their right to submit a statement of defense and any supporting evidence. AR 856. In February 2016, petitioners submitted a 135-page statement of defense—including legal argument, written testimony, and 19 exhibits of documentary evidence—but still took no action to resolve the violation. Pet. App. A9; AR 963-1097. The Commission scheduled a public hearing to resolve the matter. Pet. App. A9.

In November 2016, in advance of that hearing, Commission staff prepared and sent to petitioners a report with proposed findings and recommendations, including a summary of and response to petitioners' arguments. Pet. App. A9-A10; AR 3011-3116. The re-

port calculated that the Commission had statutory authority to issue a penalty of up to $8.37 million: the maximum statutory daily penalty of $11,250 multiplied by 744—the total number of days that had elapsed since the Commission advised petitioners that their continuing violations could expose them to penalties under Section 30821. Pet. App. A9-A10. The report observed that a penalty in that amount would be warranted in light of the "significant blockage of public access" to the coast that petitioners had caused and their persistent refusal to comply with the law. *Id.* at A10. But "taking the most conservative possible approach in weighing the relevant statutory factors," the report recommended a penalty of between $800,000 and $1.5 million, and specifically $950,000. *Id.*

At the December 2016 hearing, petitioners' counsel presented a defense, and the Commission heard testimony from several individuals, including one of the petitioners, the executive officer of the Conservancy, and several members of the public. Pet. App. A10. The executive officer told the Commission that the Conservancy's engineers had determined it was feasible to build an accessway in the easement area, and that petitioners' refusal to remove the structures was the only remaining impediment to construction of the accessway. *Id.*; AR 4222-4224. Petitioners did not avail themselves of the opportunity to submit questions for the Commission to pose to other speakers at the hearing. *See* AR 4140-4141, 4251. Nor did petitioners seek to reserve any time for rebuttal; indeed, they did not use all of their allotted time. *See* AR 4187-4188, 4213-4217.

During the Commission's public deliberations, several commissioners said that they found petitioners'

persistent refusal to comply with the law to be particularly egregious, warranting a penalty higher than the staff's recommendation. Pet. App. A10-A11. Ultimately, the Commission voted unanimously to impose a penalty of $4.185 million (half of the statutory maximum) and to require petitioners to remove the structures. *Id.* at A11.

3. a. In February 2017, petitioners filed a petition in state trial court seeking to set aside the Commission's orders. Pet. App. B1; *see* Cal. Code Civ. Proc. § 1094.5. The court found that there was "overwhelming evidence" that petitioners had violated the Coastal Act by "interfering with the public's right of access to the ocean via the easement," and that petitioners' conduct had "substantially impaired" the Conservancy's "ability to move forward with a public accessway." Pet. App. B42. The court determined that these findings supported the Commission's issuance of the cease-and-desist order and civil penalties under Section 30821, *id.* at B28-B57, and that the penalty was not unconstitutionally excessive, *id.* at B58-B62. As to the due process claim, the court concluded that it "mostly lacks merit," but that the Commission should have explicitly given petitioners a chance to present evidence or argument in opposition to the amount of the penalty that exceeded the staff recommendation. *Id.* at B75. The court thus directed the Commission to set aside its order and conduct a new hearing with respect to the penalty amount, but denied petitioners' mandamus petition "[i]n all other respects." *Id.* at B76.

b. Petitioners appealed and the Commission cross-appealed. Pet. App. A12. The court of appeal reversed the trial court judgment setting aside the penalty, thereby upholding the Commission's order in full. *Id.* at A65.

As relevant here, the court of appeal rejected petitioners' due process claim. Pet. App. A33-A46. Petitioners had primarily argued that "section 30821 is unconstitutional on its face because it allows the Commission to impose substantial penalties without giving alleged violators sufficient procedural protections." *Id.* at A33. To prevail on that kind of facial challenge, petitioners bore the burden of showing that a due process violation would occur at least "in the generality or great majority of cases." *Id.* at A34 (quoting *Cal. Sch. Bds. Ass'n v. State*, 8 Cal. 5th 713, 724 (2019)). After applying the factors laid out by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the court determined that petitioners had failed to make such a showing. Pet. App. A34-A45.

The first *Mathews* factor addresses the private interest affected by the government action. 424 U.S. at 335. The court of appeal reasoned that while the Commission "has the potential to impose significant penalties," which in certain cases could "require a proceeding that more closely resembles a trial," that possibility "has less relevance to [petitioners'] facial challenge" because the Commission is not required to impose a penalty—and in certain instances is prohibited from doing so. Pet. App. A36-A37. Petitioners had made no showing "that in the generality or the great majority of cases the Commission's imposition of a fine would violate due process." *Id.* at A36.

The second *Mathews* factor focuses on the procedures used to avoid an erroneous deprivation. 424 U.S. at 335. The court of appeal observed that "several provisions" of the Coastal Act and the Commission's regulations "ensure alleged violators have a meaningful opportunity to be heard." Pet. App. A37. Those provisions include the requirement that the alleged violator

receive notice of the charges, the supporting evidence, and the potential penalty range; an opportunity to submit a written defense; a public hearing where the alleged violator and other interested parties may speak; and an opportunity to "submit questions to the Commission to ask other speakers." *Id.* at A37-A38; *see supra* pp. 2-3. Petitioners failed to "explain why these protections are insufficient in the generality or in the great majority of cases." Pet. App. A38.

Finally, the third *Mathews* factor considers the government interest. 424 U.S. at 335. The court of appeal reasoned that "the Commission has an interest in efficiently remedying violations of the Coastal Act" that impede public access, which it can more readily do without employing "trial-like" procedures in every case. Pet. App. A41.

The court of appeal then explained that petitioners had failed to develop an as-applied due process challenge to the Commission's hearing procedures. Pet. App. A45-A46. They had not raised any such claim in their writ petition, nor had they "identified any specific procedural protection they contend was necessary" in their case. *Id.* For example, they did not identify any "particular witness" whom they "needed to cross-examine" or whose testimony they "needed to subpoena." *Id.* at A46, D2. Thus, while the court acknowledged that "[t]here may be instances where an agency" violates due process "by imposing a substantial penalty without giving the alleged violator a fair opportunity to present a defense," petitioners had not shown that theirs was such a case. *Id.* at A45-A46.

The court of appeal also rejected petitioners' Eighth Amendment claim. Pet. App. A57-A65. It noted that the "touchstone" of the analysis under the

Excessive Fines Clause "is the principle of proportionality," which encompasses four factors: "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." *Id.* at A57 (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) and *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 727-729 (2005)). Petitioners' culpability was high because they "continued to violate the law by refusing to remove the unpermitted structures" despite being repeatedly told to do so over a nine-year period. *Id.* at A58-A59. The penalty was proportional to the harm petitioners caused in light of the significant importance of public access to the coast and the fact that their conduct prevented the construction of an accessway, thereby blocking the only public access point to Las Flores Beach. *Id.* at A60-A61. The maximum daily penalty for an ongoing violation under Section 30821 is comparable to penalties under other environmental protection statutes. *Id.* at A62-A64. And petitioners chose not to present any evidence suggesting an inability to pay—even though they had received notice that they faced a penalty of up to nearly $8.4 million. *Id.* at A64-A65.

c. Petitioners filed a petition for review in the California Supreme Court, which that court denied. Pet. App. E1.

ARGUMENT

The state courts correctly rejected petitioners' claims under the Due Process and Excessive Fines Clauses. Petitioners have not shown that the procedures the Commission affords alleged violators in civil-penalty proceedings—including notice of the violation, an opportunity to submit a written defense and appear at a public hearing represented by counsel, and

the ability to submit questions to be posed to other speakers—violate due process, either on their face or as applied in this case. Nor does the civil penalty the Commission imposed violate the Eighth Amendment. While the amount of the penalty is undoubtedly substantial, the Commission reasonably determined it was an appropriate sanction under the unique circumstances of this case. Petitioners' open defiance of the law—blocking an undisputed public access easement over their property for nearly a decade—effectively prevented the public from accessing Las Flores Beach, thwarting important policies enshrined in the California Constitution and the Coastal Act.

I. PETITIONERS' DUE PROCESS CLAIM DOES NOT WARRANT REVIEW

Petitioners' due process argument elides the distinction between a facial and an as-applied challenge—a distinction on which the court of appeal rested its analysis. As that court recognized, petitioners have failed to establish that the Commission's administrative hearing procedures are facially unconstitutional because there is no indication that the procedures will violate due process in all or most cases. Petitioners' belated attempt to assert an as-applied due process claim on appeal fails because they have never sought to show that the particular circumstances of their case necessitated the procedures they seek. An as-applied due process claim of that kind remains available to alleged violators in other cases where the circumstances may call for additional procedures. And the decision below does not create any conflict of authority or otherwise merit further review.

1. The court of appeal rejected petitioners' facial due process challenge because petitioners had not

shown that the Commission's procedures were constitutionally inadequate "in the generality or great majority of cases." Pet. App. A34; *see id.* at A34-A45; *cf. United States v. Salerno*, 481 U.S. 739, 745 (1987).[5] That conclusion is correct and aligns with this Court's precedent.

a. The court of appeal recognized—and petitioners agree—that the framework set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), governs their due process claim. *See* Pet. App. A33-A34; Pet. 16. That "flexible" inquiry "calls for such procedural protections as the particular situation demands," with a focus 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, if any, 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 334, 335.

While "some form of hearing is required before an individual is finally deprived of a property interest," *Mathews* "reiterate[d]" that "differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" 424 U.S. at 333, 348 (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143

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[5] In adjudicating facial challenges, California courts have applied two slightly different analyses: one that approximates the *Salerno* test and a second that is "more lenient" from the challenger's perspective and asks "whether the statute is unconstitutional 'in the generality or great majority of cases.'" *Cal. Sch. Bds. Ass'n v. State*, 8 Cal. 5th 713, 723-724 (2019).

(1940)). "The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Beyond that, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' to insure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349 (citation omitted). And in the context of a facial due process challenge, the relevant question is whether the weighing of the *Mathews* factors necessitates the requested additional procedures "in every . . . proceeding" of the kind at issue, *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31 (1981), or at least in "the generality of cases," *Mathews*, 424 U.S. at 344.

The court of appeal faithfully applied those principles in rejecting petitioners' facial due process claim. It reasoned that petitioners had not shown "that in the generality or the great majority of cases the Commission's imposition of a fine would violate due process," because while some proceedings under Section 30821 might entail substantial penalties, there is no minimum penalty and the Commission is prohibited from imposing penalties for certain kinds of violations. Pet. App. A36-A37. The court also explained that "the Coastal Act and the regulations adopted by the Commission are designed to ensure alleged violators have a meaningful opportunity to be heard." *Id.* at A37. The Commission must give the alleged violator notice of the allegations and at least 20 days to submit a written response, and it must conduct "a duly noticed public hearing." *Id.* At the hearing, the alleged violator may "present his or her position" and submit "evidence that could not have been set forth" in writing. *Id.* at

A38. And "[a]ny speaker, including the alleged violator, may submit questions to the Commission to ask other speakers." *Id.* These kinds of procedures "provide a meaningful hedge against erroneous action." *Goss v. Lopez*, 419 U.S. 565, 583 (1975). There is no reason to believe they are facially inadequate, even if "something more" might be required in certain individual cases. *Id.* at 584.

In addition, the court of appeal noted that certain common features of proceedings under Section 30821 make it unlikely that due process will require a trial-type hearing in a typical proceeding. First, the Commission "will generally rely on documentary evidence," which often does not entail "a critical need to inquire into credibility via cross-examination." Pet. App. A39. This Court has used similar reasoning in explaining why cases that principally involve documentary evidence typically do not require trial-type hearings. *See, e.g.*, *Mathews*, 424 U.S. at 343-344 (Social Security benefits); *Dixon v. Love*, 431 U.S. 105, 113 (1977) (driver's license revocation). Second, the Commission's ultimate decision whether to impose a penalty—and, if so, in what amount—is largely "evaluative in nature," focusing on "consideration of a host of intangible factors rather than on the existence of particular and contestable facts." Pet. App. A40. Again, this Court has recognized that a trial-type hearing is less likely to be necessary in that type of proceeding. *See, e.g.*, *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (higher education performance reviews); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 9-10 (1979) (parole hearings).

b. Petitioners propose an alternative approach in which "a full evidentiary hearing" is required for any

administrative proceeding that has the potential to result in a "substantial deprivation" of property. Pet. 16. They do not specify how to identify a "substantial" deprivation or exactly what procedures they believe such a hearing must entail. But they fault the Commission for not granting them a range of trial protections beyond those provided in the Coastal Act and its regulations, including the "right to subpoena witnesses or documentary evidence," the "right to notice of those who would testify against them," the "right to demand testimony under oath" and to "cross-examine witnesses," the "right to exclude hearsay or speculative evidence," and the "right to present rebuttal testimony or evidence." *Id.* at i.

This Court has never suggested, however, that a full trial-type hearing of that kind is categorically required for any administrative proceeding that has the potential to affect "substantial" private interests. To the contrary, it has emphasized that the procedures required by due process typically "var[y] from case to case in accordance with differing circumstances." *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949); *see, e.g.*, *id.* at 276-277 (due process does not always require oral argument in agency adjudication). Even where substantial private interests may be at stake, the due process inquiry generally proceeds "on a case-by-case basis." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973). In *Gagnon*, for instance, the Court recognized that parole revocation threatens a "serious deprivation" of liberty, *id.* at 781, which may necessitate the appointment of counsel "on a case-by-case basis," *id.* at 790; but the Court declined to impose an "inflexible" rule uniformly requiring the appointment of counsel, *id.*; *see also, e.g.*, *Lassiter*, 452 U.S. at 31-32 (similar holding for termination of parental rights); *Goss*, 419 U.S. at 584 (school suspensions).

Petitioners rely heavily on due process cases that arose in settings such as the termination of welfare benefits, *see Goldberg v. Kelly*, 397 U.S. 254, 268-270 (1970), and public employment, *see, e.g.*, *Loudermill*, 470 U.S. at 545-546. *See* Pet. 16-24. But those authorities are of limited relevance here because "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974). In *Goldberg*, for example, the Court's analysis rested largely on the nature of the interest at stake—public provision for "the basic demands of subsistence" for the poor—and the fact that the "credibility and veracity" of witnesses is frequently at issue in welfare-termination proceedings. 397 U.S. at 269. No comparable considerations are categorically present in civil penalty proceedings under Section 30821.

Petitioners fault the court of appeal for reasoning that because Section 30821 proceedings often depend on "documentary evidence," trial-type procedures will frequently be unnecessary. Pet. 23-24; *see* Pet. App. A39. In their view, this principle applies only in "administrative proceedings that focus[] on objective facts readily ascertainable by written evidence," such as driving records and medical reports. Pet. 24. But petitioners do not explain why violations of the Coastal Act—which are typically identified based on property and permit records and written communications—are facially less susceptible to resolution by documentary evidence than disputes regarding driving records, *see Dixon*, 431 U.S. at 113, or medical reports, *see Mathews*, 424 U.S. at 344-345.

Similarly, petitioners argue that the court of appeal should not have invoked the "evaluative considerations" principle (*see supra* p. 15) because "only *part* of" a Section 30821 proceeding involves the consideration of intangible factors by the Commission. Pet. 25-26. But the Commission's judgments regarding factors like the "gravity" of a violation and the violator's "degree of culpability," Pet. App. A40, are not categorically different from a school official's judgment whether a medical student has "the necessary clinical ability to perform adequately as a medical doctor," *Horowitz*, 435 U.S. at 90, or whether a prisoner deserves parole, *Greenholtz*, 442 U.S. at 10. In each of those settings, the administrative decision turns on "an amalgam of elements, some of which are factual but many of which are purely subjective appraisals" by government officials. *Id.* As this Court has recognized, that counsels in favor of a case-by-case approach to the due process inquiry.

Ultimately, petitioners seek to invert the standard of review for facial due process claims—arguing that because additional procedures might sometimes be necessary in Section 30821 proceedings, such procedures must be afforded in every case. But the extent to which the Commission's penalty determinations entail a substantial deprivation of property, or turn on documentary evidence or "evaluative considerations" as opposed to disputed facts or witness credibility, will vary significantly from case to case. If particular cases involve important and disputed questions of fact or testimony that needs to be subpoenaed, due process may well require additional procedures. But that would be the basis for an as-applied due process claim, not a facial one.

2. The court of appeal also correctly determined that petitioners failed to develop an as-applied due process claim. Pet. App. A45-A46. The court noted that petitioners' mandamus petition did not assert any such claim. *Id.* at A45. And their opening brief on appeal included only "a one-paragraph argument" asserting that the Commission's procedures were "unconstitutional as applied to them because the Commission imposed a large penalty." *Id.* Petitioners did "not identif[y] any specific procedural protection they contend was necessary to avoid an erroneous deprivation of their interests." *Id.* at A46. For example, they did not identify any "particular witness" whom they "needed to cross-examine" or whose testimony they "needed to subpoena." *Id.* at A46, D2. The court of appeal thus recognized that while "[t]here may be instances where an agency" violates due process "by imposing a substantial penalty without giving the alleged violator a fair opportunity to present a defense," petitioners failed to make out any such claim here. *Id.* at A45-46.

Petitioners do not appear to seek this Court's review of that case-specific holding. *See* Pet. 16-26. In any event, the court of appeal's conclusion is correct and does not warrant further review. While petitioners now vaguely assert that certain speakers at the Commission's hearing made "false statements" (Pet. 13), petitioners did not raise any such concern at that hearing or ask for an opportunity to rebut any statements. *See* AR 4219-4220, 4225-4227, 4235-4240. Petitioners were focused primarily on their argument that the structures were lawful and did not need to be removed, not on factual or credibility disputes. *See* AR 4187-4198; Pet. App. B28-B34. They did not ask to reserve time for rebuttal or submit questions for members of the Commission to ask those speakers—or any

other speakers at the hearing. *See* AR 4140-4141, 4251; Cal. Code Regs. tit. 14, § 13185(a). "[W]ithout trying" to use these state law procedures, petitioners "can hardly complain that [the procedures] do not work in practice" and are inadequate as a matter of due process. *Dist. Attorney's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71 (2009).[6]

The Commission recognizes that the penalty it imposed in this case is a substantial one. An as-applied due process challenge to a proceeding resulting in a substantial monetary penalty is certainly available to an alleged violator under California law. *See* Pet. App. A45-A46; *e.g.*, *Manufactured Home Cmtys., Inc. v. County of San Luis Obispo*, 167 Cal. App. 4th 705, 711-712 (2008). And if a government agency sought to impose a penalty of similar magnitude in a case involving (for example) significant and material factual disputes or a key witness unwilling to testify, a case-specific argument for procedures such as cross-examination or a subpoena might well succeed. But the court of appeal below correctly recognized that petitioners failed to develop any as-applied due process claim here.

3. Petitioners are not correct that the court of appeal's decision creates "many conflicts" with decisions of other courts. Pet. 16, 21 (capitalization omitted).

a. Petitioners first contend that the court of appeal's decision conflicts with decisions of the Fifth, Sixth, and Eighth Circuits, as well as the supreme courts of six States, which petitioners characterize as

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[6] Petitioners assert that they had "no right to present rebuttal." Pet. 3. While the Commission's regulations do not expressly mention rebuttal, the Commission's routine practice is to allow alleged violators to reserve time for rebuttal. Petitioners here did not ask for rebuttal or use their full allotted time. *Supra* p. 7.

holding that "what matters" for purposes of the first prong of the *Mathews* analysis is "the upper limit of the deprivation that may result." Pet. 17. That argument again mistakenly conflates facial and as-applied due process claims. The court of appeal recognized that, as applied in specific cases, "due process may require a proceeding that more closely resembles a trial" when the Commission seeks to impose a significant penalty. Pet. App. A36. But that "potential has less relevance to petitioners' facial challenge" because a wide range of penalty amounts may be at issue in any given proceeding under Section 30821—and, for some types of violations, the Commission is prohibited from imposing any penalty at all. *Id.* at A36-A37.

That analysis does not create any conflict. Indeed, several of the decisions petitioners cite (Pet. 18-19 & nn.10-18) have relied on this Court's decision in *Lassiter* to reach similar conclusions. For instance, in *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983) (en banc) (per curiam), the court held that a "case-by-case" analysis is necessary, assessing "the relative weight of the [*Mathews*] factors in each individual case" to determine whether due process requires the appointment of counsel in dependency proceedings. *Id.* at 517-518 (citing *Lassiter*, 452 U.S. at 31-32). The Colorado Supreme Court applied *Lassiter* in a similar context in *C.S. v. People*, 83 P.3d 627, 636-637 (2004), evaluating the particular circumstances of the case to reject an as-applied due process claim seeking the appointment of counsel in a case terminating parental rights. In *Wake County ex rel. Carrington v. Townes*, 306 N.C. 333 (1982), the court likewise held that a "case-by-case" analysis is required to determine whether due process requires the appointment of counsel in civil paternity suits. *Id.* at 335; *see id.* at 337-339 (citing *Lassiter*, 452

U.S. at 31-32). And in *United States v. Silvestre-Gregorio*, 983 F.3d 848, 854-857 (6th Cir. 2020), the court cited *Lassiter* in rejecting a facial due process claim that sought the appointment of counsel for juveniles in immigration removal proceedings, while leaving open the possibility of as-applied claims in particular cases.

In other decisions that petitioners cite, courts rejected facial due process claims without addressing whether as-applied challenges might be asserted in specific instances. *See City of Bellevue v. Lee*, 166 Wash. 2d 581, 585-589 (2009) (upholding procedures for suspension of driver's licenses); *Matter of Polk*, 90 N.J. 550, 560-569 (1982) (upholding use of preponderance of the evidence standard in medical license revocation proceedings). And those cases identified by petitioners that involved successful due process claims arose in settings far removed from civil penalty proceedings under Section 30821.[7]

Petitioners characterize the decision below as an outlier because it did not describe the interest of an alleged violator as categorically "substantial" or "important." *See* Pet. 17-19 & nn.10-18. But several of

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[7] *See Bliek v. Palmer*, 102 F.3d 1472, 1473, 1475-1478 (8th Cir. 1997) (State must notify food-stamp recipients of its authority to settle claims arising from over-issuances of food stamps); *In re Sanders*, 495 Mich. 394, 415-420 (2014) (State may not abrogate one parent's rights based on a showing that the other parent is unfit); *Giaimo v. City of New Haven*, 257 Conn. 481, 511-516 (2001) (procedure for transferring an employer's workers-compensation liability to state fund violated due process because it afforded no opportunity for employer to review evidence and proposed findings or to present their own evidence and arguments).

the cases petitioners cite recognize—as the court of appeal did here—that the weight of the claimant's personal interest under the first *Mathews* prong will often vary from case to case, and is not always "assessed according to potentially [the] worst deprivation" authorized under the statute generally, Pet. 18. *See, e.g.*, *Davis*, 714 F.2d at 516; *Silvestre-Gregorio*, 983 F.3d at 855; *C.S.*, 83 P.3d at 636-637. That aligns with this Court's guidance in *Lassiter*.[8] Particularly in light of the wide range of penalty amounts that might be at issue in any given proceeding under Section 30821, the court of appeal's analysis of the first *Mathews* factor was sensible in the context of petitioners' facial challenge. In contrast, many of the cases petitioners cite involved proceedings with a set of binary outcomes, such as whether welfare benefits or government employment will be terminated or not. Those situations may be less likely to involve substantial case-by-case variation with respect to the personal interest at stake because only a single kind of adverse result for the claimant is possible.

b. Petitioners also argue that the decision below conflicts with decisions of several courts ostensibly recognizing a "presumption" that "heightened procedural protections are the rule, not the exception, when an accused faces potentially catastrophic consequences." Pet. 22. That is not correct either.

Most of the cases petitioners cite (Pet. 22) involved as-applied due process claims in which courts concluded that additional procedures were necessary in

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[8] *See* 452 U.S. at 31 ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak," due process would require appointment of counsel, but "the *Eldridge* factors will not always be so distributed[.]").

light of the nature of the issues in dispute in each case. In other words, the claimants made precisely the kind of case-specific showing that petitioners have failed to make here. For instance, in *Ching v. Mayorkas*, 725 F.3d 1149, 1157-1159 (9th Cir. 2013), the court concluded, on "a case by case basis" and "given the specific circumstances involved," that the denial of a visa petition violated due process because the central disputed issue was whether the applicant's previous marriage was fraudulent. That issue turned on a credibility dispute between the applicant and her former husband, and the applicant had had no opportunity to cross-examine the husband or the immigration officers who interviewed him. *Id.* And in *McNeill v. Butz*, 480 F.2d 314 (4th Cir. 1973), the court reasoned that in "the circumstances before us," where "the propriety of dismissal" from government employment "hinged strictly on factual determination, and the evidence consisted primarily of individual testimony," an opportunity for cross-examination was required. *Id.* at 322, 326.[9]

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[9] *See also Bus. Commc'ns, Inc. v. U.S. Dep't of Educ.*, 739 F.3d 374, 380 (8th Cir. 2013) ("Where, as here, many of the [government's] reasons for its decision depend on the credibility of individual witness testimony, cross-examination must be available"); *Doughty v. Dir. of Revenue*, 387 S.W.3d 383, 388 (Mo. 2013) (no due process violation where revocation of driver's license "turned on questions of fact" but claimants declined to subpoena testimony from police officers who had arrested them); *Carr v. Iowa Emp. Sec. Comm'n*, 256 N.W.2d 211, 212, 216 (Iowa 1977) (due process required opportunity for cross-examination where denial of unemployment benefits turned on factual dispute regarding whether former employee left job voluntarily); *Tyree v. Evans*, 728 A.2d 101, 104-106 (D.C. 1999) (opportunity for cross-examination required where civil protection order turned on disputed facts and "significantly limited [the accused's] freedom of action" by forbidding communication with the accuser and requiring him

Only one of the cases in petitioners' asserted conflict involved a successful facial due process challenge. In *Society for Savings v. Chestnut Estates, Inc.*, 176 Conn. 563 (1979), the court held that Connecticut's deficiency-judgment statute violated due process because it did "not require that the defendant be afforded an opportunity to participate in the determination of the value of the property by presenting evidence and because it does not provide the opportunity for cross-examination." *Id.* at 573-574. That situation is not analogous to civil-penalty hearings under Section 30821, where alleged violators may submit a written defense, participate at a public hearing represented by counsel, and submit questions to be asked of other speakers, among other protections. *Supra* pp. 2-3.

4. Petitioners argue that this Court's review is "urgently needed" because 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." Pet. 34. That characterization is not accurate. The Commission has used its authority judiciously, imposing civil penalties in only two cases to date, including this one.[10] Petitioners assert that the Commission has issued "just short of ten

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to attend counseling); *Smith v. Miller*, 213 Kan. 1, 14 (1973) ("under the particular circumstances" of the case, a student threatened with expulsion because of an assault had a right to "cross-examine the principal witness against him" because "the critical issue," the "identity of the assailant," was "a disputed issue of fact where credibility of witnesses was important in reaching a fair decision").

[10] Cal. Coastal Comm'n, *Report to California Legislature on Implementation of Coastal Commission Administrative Penalty Authority From 2015-2018* (Jan. 2019) (*Penalties Report*), at 10,

orders, with an average penalty of about $1 million." Pet. 33. But that statistic conflates penalty orders with consent orders in cases resolved by settlement, of which there have been an additional six.[11] Those cases represent some of the most serious violations the Commission has encountered in recent years—and they account for a small fraction of the 175 public-access cases between 2015 and 2019, the vast majority of which were resolved informally with no civil penalty or consent order.[12]

II. PETITIONERS' EIGHTH AMENDMENT CLAIM DOES NOT WARRANT REVIEW

Petitioners also contend that review is needed to provide guidance regarding when a fine qualifies as "grossly disproportional" under the Eighth Amendment. *See* Pet. 26-35. But the court of appeal applied a well-settled multifactor test that is consistent with this Court's opinion in *United States v. Bajakajian*, 524 U.S. 321 (1998), and largely identical to the test used in other jurisdictions across the Nation. At bottom, petitioners simply disagree with the application of that settled approach to the specific facts of their case. That question does not merit this Court's review. In any event, the Commission and the state courts reasonably concluded that petitioners' willful, repeated refusal to comply with the Coastal Act—which effectively blocked public access to a lengthy stretch of coastline over a period of several years—merited a substantial penalty.

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https://tinyurl.com/3w3sn864.

[11] *Penalties Report*, *supra* note 10, at 20.

[12] *Id.* at 6, 10.

1. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. More specifically, a fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity" of the offense. *Id.* This Court explained in *Bajakajian* that two considerations "counsel[ed]" in favor of adopting the "standard of gross disproportionality" rather than "requiring strict proportionality." *Id.* at 336. First, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* Second, "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.*

The court of appeal here applied the four-factor test articulated by the California Supreme Court in light of *Bajakajian*. That test considers "(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes; and (4) the defendant's ability to pay." Pet. App. A57; *see People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005). The court of appeal reasoned that (1) petitioners had a high level of culpability because they willfully and continually violated the Coastal Act over a period of several years; (2) petitioners' conduct caused substantial harm by preventing the construction of an accessway over the only public easement leading to Las Flores Beach; (3) the daily penalties established by the Legislature under the Coastal Act are comparable to those in other environmental protection statutes; and (4) petitioners

had made no showing regarding any inability to pay. *See* Pet. App. A58-A65.[13]

Petitioners argue that the court of appeal erred in failing to "assess petitioners' alleged wrongdoing and harm in a *comparative* context." Pet. 27. They suggest that the court improperly "equate[d]" their conduct with "wrongdoing like government contracting fraud, toxic dumping, deceitful advertising, and similarly grave *mala in se* that directly harms the public health, safety, or welfare," which has been subject to fines or forfeitures of up to $40 million. *Id.* at 30. But they do not identify any precedent supporting their view that a fine of $4.185 million for unlawfully blocking public access to the coast over a period of several years is grossly disproportionate.

As the court below reasoned, the harm the Lents caused "may be difficult to quantify." Pet. App. A62. But petitioners are wrong to suggest that their conduct caused little "actual harm to the public." Pet. 32. The State of California places an exceptionally high value on public access to the coast. The right of coastal access is explicitly recognized in the California Constitution, *see* art. X, §§ 3, 4, as well as in the Coastal Act, *see* Cal. Pub. Res. Code § 30210. That access is vital for a number of reasons. Most significantly, it allows the public to reach the navigable waters and the tidelands—that is, all land between the mean high and

[13] The court cited the federal Clean Water Act and several California statutes regarding unlawful deposits of waste as examples of statutes providing for similar daily civil penalties. Pet. App. A63-A64; *see, e.g.*, 33 U.S.C. § 1319(d) (civil penalties of up to $25,000 per day for violations of the Clean Water Act); Cal. Health & Safety Code § 25191; Cal. Pub. Res. Code §§ 29610, 45023; Cal. Water Code §§ 13265(d), 13385(b)(1).

low tide lines—which the State holds in trust for the public. *See Marks v. Whitney*, 6 Cal. 3d 251, 257-259 (1971). More than 150 million beach visits are estimated to occur each year in the State, generating upwards of $3 billion in economic activity, in addition to immense noneconomic benefits.[14]

Petitioners also fault the court of appeal for "not taking account of the distinction between acts and omissions," arguing that their conduct amounts to the latter. Pet. 31. That distinction is not particularly meaningful in the factual context of this case. Petitioners "willfully" and "deliberately refused to remove" the unpermitted structures, despite being repeatedly instructed to do so, "for over nine years after the Commission notified them the structures violated the Coastal Act." Pet. App. A58; *see id.* at A58-A59. While petitioners did not build the structures in the first instance, they were on notice of the recorded public easement when they purchased the property with the unpermitted structures intact. And petitioners' conduct effectively excluded the public for many years from a beach in Malibu, an iconic coastal city located in the second-largest metropolitan area in the Nation. That is not at all analogous to the one-time failure to comply with a reporting requirement in *Bajakajian*, which caused "minimal" harm and affected no one other than the federal government. 524 U.S. at 339; *see* Pet. 31.

Petitioners next assert that the Commission assessed the fine "mainly to punish them for their vigorous defense and to make examples of them." Pet. 32.

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[14] *See* Pendleton & Kildow, *The Non-Market Value of Beach Recreation in California*, 74 Shore & Beach 34, 34 (2006), https://tinyurl.com/593dbsps.

That is incorrect. As the trial court found in rejecting that argument, petitioners were not "culpable because they attempted to defend themselves," but rather "because they continued to violate the law by refusing to remove the unpermitted structures." Pet. App. A59. That rationale comports with the Eighth Amendment. Whether a violator has engaged in "willful and deliberate defiance" of the law is frequently a relevant consideration in setting the amount of a fine. *United States v. United Mine Workers*, 330 U.S. 258, 303 (1947). And when statutes contemplate daily penalties for an ongoing violation, as the Coastal Act does, a central and legitimate purpose of the penalties is often to "compel" the violator "to do what the law made it his duty to do." *Penfield Co. v. SEC*, 330 U.S. 585, 590 (1947); *see also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 621-622 (1992). Petitioners could have prevented the accrual of daily penalties by complying with their legal obligations sooner, but they chose not to do so.[15]

2. Petitioners argue that the court of appeal's Eighth Amendment analysis conflicts with decisions of three federal circuits and five state supreme courts. *See* Pet. 28-30 & nn.22-30. There is no such conflict. Petitioners cite cases discussing situations such as the forfeiture of a home for "an unusually minor violation of the structuring statute not tied to other wrongdoing," *United States v. Abair*, 746 F.3d 260, 268 (7th Cir. 2014), or a hypothetical "forfeiture of an automobile for a minor traffic infraction," *County of Nassau v. Canavan*, 1 N.Y.3d 134, 140 (2003). Petitioners do not identify a single case holding that a fine imposed in a

[15] Petitioners "removed the unpermitted structures after the trial court entered judgment," but "plan to rebuild them if they are successful in this litigation." Pet. App. A19 n.3.

setting comparable to this one—daily penalties accruing for an ongoing violation of a statute designed to protect the public interest—violates the Eighth Amendment. *Cf.* Pet. App. A63-A64 (providing examples of such statutes).

Petitioners briefly contend that other courts examine a fine's "alleged excessiveness" in a "comparative context." Pet. 28. It is not clear what petitioners mean by that, but the court of appeal here explained why "the harm [petitioners] caused was proportional to the penalty" and how the penalty compared to penalties imposed under similar statutes. Pet. App. A61; *see id.* at A60-A64. In any event, there is no doctrinal confusion. Each of the jurisdictions cited by petitioners as taking an approach in conflict with the decision below has articulated a multi-factor test, based on *Bajakajian*, that is broadly similar to the test the court of appeal applied here.[16]

[16] *See von Hofe v. United States*, 492 F.3d 175, 182 (2d Cir. 2007); *Abair*, 746 F.3d at 267; *United States v. 3814 NW Thurman St., Portland, Or.*, 164 F.3d 1191, 1197-1998 (9th Cir. 1999); *Pub. Emp. Ret. Admin. Comm'n v. Bettencourt*, 474 Mass. 60, 72-74 (2016); *Dean v. State*, 230 W. Va. 40, 49-50 (2012); *Canavan*, 1 N.Y.3d at 139-140; *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 565 & n.13 (D.C. 1998); *State v. Real Property at 633 E. 640 N., Orem, Utah*, 994 P.2d 1254, 1258 (Utah 2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

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