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

REPLY IN SUPPORT OF 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

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Introduction

Petitioners Warren and Henny Lent seek this Court's review of the California Court of Appeal's ruling below. That decision upholds the power of Respondent California Coastal Commission to permanently deprive the Lents of millions of dollars in fines, following an administrative hearing conducted according to the barest of procedure, for failing to take immediate action to facilitate the development of a beach accessway.[1]

In the Commission's view, this case is an unremarkable application of the modern administrative state's enforcement apparatus. But neither the court of appeal nor the Commission has found any example of an administrative agency that:

a. has the power to issue financially crushing penalties,[2]

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[1] Contrary to the Commission's characterization, the Lents never "blocked" anything but rather always made clear their willingness to cooperate, *e.g.*, agreeing to remove any structures found to be inconsistent with an approved plan to develop the easement, AR 2946-47, giving the Conservancy and its engineers full access to the site to complete feasibility studies, AR 794, 806, and offering to pay for an engineering study to determine whether a more easily developable accessway location on the property exists, AR 884, 4216.

[2] The lowest potential maximum liability of any penalty order target is $348,750. *See* Pet. 11 & n.7. That is more than five times the American annual median family income. *See* U.S. Census Bureau, *Income and Poverty in the United States: 2020*, at 1 (2021), *available at* https://bit.ly/3G0dOU6.

b. that become immediately effective after issuance,

c. that are preceded by a hearing in which the accused are afforded (i) no notice of those who may testify against them, (ii) no right to subpoena witnesses or documents, (iii) no right to cross-examine any witness,[3] (iv) no right to demand that testimony be under oath, (v) no right to exclude hearsay or other normally inadmissible evidence, and (vi) no right to present rebuttal,[4]

d. and that are never subject to any post-deprivation plenary evidentiary review.

It should therefore come as no surprise that the court of appeal's validation of this fearsome administrative penal power—and its use against the Lents to impose a $4.185 million fine for failing to remove everyday residential accessories from a house's side alley—conflicts with the due process and excessive fines principles articulated by this Court, as well as

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[3] The Commission quibbles that the accused may provide questions to the Commission to be posed to other witnesses, Resp. 19-20, but that is a poor substitute for the truth-eliciting rigors of direct examination. Moreover, the Commission's regulations leave to a commissioner's absolute discretion whether even to pose any such questions. Pet. 11-12 n.8.

[4] The Commission protests that, in practice, it allows rebuttal. Resp. 19-20 & n.6. Yet the Commission does not dispute that there is no statute, regulation, or rule providing such a right; and it's hard to credit the Commission's claims of a longstanding practice given that the Lents were the subject of the Commission's first contested penalty order proceeding.

decisions of other lower courts implementing those principles.

The Commission's attempt to reason away those conflicts fails. To begin, the Commission's distinction between facial and as-applied claims is unavailing, because the test articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), operates outside of the usual facial/as-applied framework. Moreover, even if the facial/as-applied distinction were apt, it would be of no help to the Commission. For whether the *Mathews* private interest factor is assessed with respect to one defendant or a class of them, the question remains the same: is it the administrative proceeding's best or worst outcome that counts?

Likewise, the Commission's objection that some lower courts have required heightened procedures only on a case-by-case basis in no way erases the conflicts identified in the Lents' petition. A substantial deprivation is on the line in *every* penalty order proceeding, *supra* note 2, and by statute the Commission is required to consider, in *every* such proceeding, factors that readily lend themselves to non-documentary, testimonial proof, *see* Pet. 24 & n.20. Thus, heightened procedures are here compelled categorically for the same reasons that other courts have found them to be required only on an ad hoc basis; for these other courts were presented with administrative proceedings that sometimes but, unlike a Coastal Act penalty order proceeding, not always involve a substantial potential deprivation and non-documentary, testimonial proof.

Finally, the Commission's argument against review of the Lents' excessive fines claim founders on

the mistaken view that the lower courts are supposedly in agreement over the "well-settled multifactor test," Resp. 26, from *United States v. Bajakajian*, 524 U.S. 321 (1998). There is no such test expressly articulated in *Bajakajian*, which is precisely why the lower courts are in disarray as to the relevant factors and how to use them. *See, e.g.*, Daniel S. Harawa, *How Much Is Too Much? A Test to Protect Against Excessive Fines*, 81 Ohio St. L.J. 65, 86-89 (2020) (discussing the conflicts among the federal courts of appeals over how to apply *Bajakajian*). But what is clear is that the court of appeal's refusal to assess the Lents' allegedly wrongful nonfeasance in comparative context, or even to consider whether that nonfeasance should be punished as if it were malfeasance, conflicts with the limited guidance that this Court has provided on excessive fines, as well as decisions of other lower courts applying that guidance.

Argument

I.

Due Process and the *Mathews* Private Interest Factor

The Commission contends that the court of appeal's handling of the *Mathews* private interest factor creates no conflict with decisions of other courts because any purported conflict is based on an improper collapsing of the differing standards for facial and as-applied due process challenges. Resp. 12, 20-21. Thus, according to the Commission, the Lents' petition improperly seeks to "invert" the pertinent due process tests. Resp. 18.

The Commission is analytically confused. A challenge to administrative procedure under *Mathews* necessarily proceeds in a facial-like manner because the constitutional adequacy of such procedure turns upon an assessment of the "generality of cases." *Mathews*, 424 U.S. at 344. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330 (1985). Consequently, an administrative procedure cannot be validated merely because on rare occasion it will produce an unobjectionable outcome. *Id*. at 321 (the "fairness of a particular procedure does not turn on the result obtained in any individual case"). Yet that is the precise conflict-inducing analytic misstep that the court of appeal took below, in holding that the *Mathews* private interest factor merits little weight in assessing the constitutionality of the Coastal Act's administrative penalty regime because its mandated procedures do not compel the Commission to issue a large penalty in any case. *See* App. A-36.

Nothing in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), or similar cases concerning the right to appointed counsel, is to the contrary. *Cf*. Resp. 16, 23. Indeed, the Commission's reliance on *Lassiter* is curious, given that the Court there employed the very approach to the *Mathews* private interest factor that the court of appeal below rejected—namely, assessing the private interest based upon the worst possible outcome, not the best. *See Lassiter*, 452 U.S. at 27. To be sure, the Court in *Lassiter* acknowledged that, in a given case, the balancing of the *Mathews* factors might overcome the presumption that the State need not provide appointed counsel to a parent facing termination of parental rights. *See id*. at 31-32. But that conclusion

was necessarily tied to the Court's appointed counsel jurisprudence, which has long entertained both categorical and case-specific rules. *See Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973). There is no such parallel analytical history with respect to application of the *Mathews* test in the normal context of administrative procedure. *See Walters*, 473 U.S. at 330.

Similarly off-the-mark is the Commission's contention that there is no conflict between the decision below and decisions of other lower courts, on the theory that those other decisions employed a case-specific analysis of *Mathews*, rather than the facial analysis used by the court of appeal below and now attacked by the Lents. Resp. 21-23. Even if the Commission's "case-by-case" characterization were a fair one, it would not resolve the conflicts created by the court of appeal's ruling. For, when applying the *Mathews* private interest factor to just one individual, the question remains the same: is that individual's personal interest to be weighed according to the worst deprivation he could suffer, or rather the slightest? The Commission cites *Davis v. Page*, 714 F.2d 512 (5th Cir. 1983), *United States v. Silvestre-Gregorio*, 983 F.3d 848 (6th Cir. 2020), and *C.S. v. People*, 83 P.3d 627 (Colo. 2004), three cases relied upon by the Lents for their conflicts argument, *see* Pet. 18-19, as purportedly following the court of appeal's approach below. Resp. 23. But even viewing these cases as as-applied challenges, the courts still assessed the relevant private interest based upon the worst potential outcome—termination of parental rights or deportation—not, as the court of appeal did below, based on an outcome in which the party has nothing

to complain about. *See Davis*, 714 F.2d at 517-18; *Silvestre-Gregorio*, 983 F.3d at 854-55; *C.S.*, 83 P.3d at 636-38.

Finally, the Commission objects that many of the conflicts identified in the Lents' petition are illusory because the cases dealt with binary decisions, *e.g.*, whether to terminate benefits or employment, rather than something like the Coastal Act's administrative penalty proceeding, in which a wide range of penalty amounts may be at play. Resp. 23. But whether an administrative proceeding has two possible outcomes or twenty, the question remains the same: is the private interest to be assessed according to the very best outcome, as the court of appeal concluded below, or instead according to the worst? Resolution of that issue merits this Court's review.

II.

Due Process and the *Mathews* Procedural Safeguards Factor

Contending that this Court has never required a full trial-like procedure whenever a substantial interest is implicated, the Commission attacks the Lents' petition for failing to explain what would be a substantial-enough deprivation to compel heightened procedures under the second *Mathews* factor, or what those procedures would entail. Resp. 16-17. The Commission's critique is off-base. The Court here need not precisely define "substantial deprivation" because, by any measure, the hundreds of thousands of dollars that every accused necessarily faces is substantial. *See* Pet. 11 n.7; *supra* note 2. Similarly, the Court need not decide the precise scope of the heightened

procedures that the risk of a substantial deprivation compels, because the procedure offered by the penalty order statute is as minimal as it comes—essentially just notice and an opportunity to be heard. *See* Pet. 11-12; *supra* notes 3-4.

The Commission protests that this Court has repeatedly held heightened procedures to be unnecessary for administrative proceedings, supposedly like a Coastal Act penalty order hearing, that turn upon documentary evidence or evaluative considerations. Resp. 18-19. The Commission's objection improperly collapses two distinct aspects of a penalty order proceeding: its liability phase and its penalty phase. Although the Commission is correct that liability may often be established through documentary evidence,[5] the penalty phase will in *every* case reach non-documentary factors. That is because the penalty order statute commands that the Commission "shall take into account" such factors as the "nature, circumstance, extent, and gravity of the violation," the violator's "degree of culpability," as well as "other matters as justice may require." Cal. Pub. Res. Code §§ 30821(c), 30820(c)(1), (3), (5). To be sure, heightened procedures may be dispensed with when an administrative decision "turns on 'an amalgam of elements, some of which are factual but many of which are purely subjective appraisals,'" Resp. 18 (quoting *Greenholtz v. Inmates*, 442 U.S. 1, 10 (1979)). *See* Resp. 24. But a decision is evaluative in this sense only where "there is no set of facts which, if shown, [would] mandate a decision favorable to the individual." *Greenholtz*, 442 U.S. at 10. Yet the

[5] But, as the Lents' case demonstrates, that is not always true. *See* Pet. 12 n.9.

Commission itself acknowledges that the liability phase of a penalty order proceeding turns upon proof of facts, *see* Resp. 17, facts which even the court of appeal below conceded "may depend on the testimony of a percipient witness," App. A-39—precisely when additional procedural safeguards like cross-examination would be most helpful.

III.

Excessive Fines

Below, the court of appeal concluded that a $4.185 million fine, levied for the alleged offense of failing immediately to remove normal residential accoutrements located within an undeveloped public beach accessway, is not unconstitutionally excessive.[6] The Commission's general objection to this Court's review of that ruling is that the court of appeal merely applied the "well-settled multifactor test" from *Bajakajian*. Resp. 26. Contrary to the Commission's characterization, there is no clear test articulated in *Bajakajian*, much less a well-settled one employed by the lower courts. *See, e.g.*, *Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013) ("*Bajakajian* hardly

[6] The Commission contends that the accessway would have been opened long ago were it not for the Lents' purported refusal to cooperate. Resp. 5-6. That contention is belied by the many decades during which the Commission and its coordinate agencies failed to take any action to develop the easement. *See* App. B-3 to B-4 (easement was recorded in 1982 but "conceptual plans" for the accessway were not produced until 2010). It is belied as well by the fact that the very tardy application to develop the easement has now languished with the City of Malibu for 30 months, Pet. 7 n.2, no doubt due in part to the insuperable engineering challenges presented, Pet. 9 n.6.

establish[es] a discrete analytic process . . . ."); David Pimentel, *Forfeitures and the Eighth Amendment: A Practical Approach to the Excessive Fines Clause as a Check on Government Seizures*, 11 Harv. L. & Pol'y Rev. 541, 543-44 (2017) ("[T]he result [after *Bajakajian*] has been a patchwork of inconsistent tests that have emerged in the various circuits and only muddled the issue.").

More specifically, the Commission argues that review is not merited because the court of appeal correctly assessed the gravity of the Lents' alleged wrongdoing in light of the importance that the California legislature has assigned to public beach access. Resp. 28-29. The Commission misses the point. The review-worthy misstep in the court of appeal's analysis is not its recognition that Californians care about beach access. The error is that, unlike this Court in *Bajakajian* and many other lower courts, the court of appeal's analysis fails to assess the harm of the alleged wrongdoing in context. Pet. 27-29. For example, the court of appeal gave no consideration to (i) whether public access to that portion of the beach fronting the house is particularly desirable given that the beach lacks any restrooms or other facilities, and often is entirely submerged, *see* AR 1054-55, or (ii) whether allegedly delayed access to a portion of a nine-mile segment of the California coast for which the state already possesses over twenty other access easements, AR 478, AR 589, represents a de minimis infringement upon public rights.

The Commission also takes aim at the Lents' distinction between acts and omissions, concluding that it is beside the point because the alleged obstruction of beach access amounts to affirmative conduct. The Commission plays a word game. A failure to act does not become an act simply by recasting the omission as a "willful[]" or "deliberate[] refus[al]" to act, Resp. 29 (quoting App. A-58). Relatedly, the Commission argues that the Lents' case is distinguishable from those like *Bajakajian*, in which the offense was a one-time failure, because the Lents were guilty of extended inaction. Resp. 29. The question, however, is not whether one can conceive of a wrongful failure to act that is less grave than the failure to act with which the Lents are charged. Rather, the question is whether the government may treat nonfeasance as if it were malfeasance, as the court of appeal concluded, or instead whether the distinction between actions and omissions is one that is relevant in assessing a fine's excessiveness, as this Court and others have concluded. Pet. 31.

Finally, the Commission argues that the Lents have identified no conflicts because none of their cited cases concerns "daily penalties accruing for an ongoing violation of a statute designed to protect the public interest." Resp. 31. The Commission's argument against the existence of any conflict actually identifies an additional question for this Court's review—namely, whether the government can avoid the constitutional limitations on its punitive power by enacting statutes that assess daily penalties for the same "continuing" violation. Such an issue is particularly well presented in the Lents' case, given that a penalty order target cannot compel the

Commission to initiate a penalty order proceeding, *see* Cal. Code Regs. tit. 14, § 13181(a), or seek pre-enforcement review, *see California v. Superior Court*, 524 P.2d 1281, 1288 (Cal. 1974) (an action for declaratory relief "is not appropriate to review an administrative decision"), and thus has no way to limit daily-penalty liability other than by complying with the Commission staff's demands. Yet, by settling the matter to avoid additional daily penalties, a penalty order target thereby waives judicial review. *See* Pet. 34 n.33.

Conclusion

Although arising in California, the questions presented in the Lents' petition reverberate beyond that State. As the administrate state grows, so too does its appetite for increased enforcement powers that test the boundaries of due process and other constitutional rights. The Lents' petition offers the Court a clean vehicle for resolving conflicts over the level of constitutional process, and the availability of the defense against punitive excess, that are raised when individuals face crushing, life-altering punishment for alleged administrative violations.

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