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**

## BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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## BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

### INTEREST OF *AMICUS CURIAE*

*Amicus curiae* AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF has a particular interest in this case because it believes businesses and individuals, like the Lents, are constitutionally entitled to due process of law before the government may deprive them of property rights and impose draconian quasi-criminal penalties.

Section 30821 of the California Coastal Act, Cal. Pub. Res. Code § 30821, violates the Constitution's promise of due process by allowing the California Coastal Commission ("CCC" or "Commission") to impose millions of dollars of so-called "administrative civil penalties" for alleged malum prohibitum "beach access" violations after an "informal" hearing held as

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

part of a public meeting before an administrative tribunal that acts as prosecutor and judge in its own cause. Due process demands more. Affected property owners, like the Lents, are entitled to a fair hearing on a level playing field before a neutral, independent judge in a court of law, with basic procedural safeguards, including fair notice of the potential penalty and potential witnesses, a right of cross-examination under oath, and a right to respond to the charges against them. If the CCC wants to prosecute the Lents for alleged "beach access" violations and seek millions of dollars in quasi-criminal penalties, the Constitution requires it do so in a court of law before an independent, neutral, and unbiased judge.

## SUMMARY OF ARGUMENT

The stakes of this case are high for both the Lents and the U.S. Constitution. At issue here is a $4,185,000 "administrative civil penalty" the CCC imposed on the Lents for an alleged violation of the terms of an easement. That quasi-criminal penalty was imposed after a three-and-a-half-hour "informal" hearing at a public meeting. The Lents had no notice of the magnitude of the penalty under consideration and no right to respond to, let alone cross-examine, the unsworn statements of surprise "witnesses" who made new factual assertions, introduced new damages calculations, and argued for the first time the penalty should be increased several-fold over that which staff recommended. That is no exaggeration—and all of this is captured on video.

The California statutory scheme at issue authorizes imposition of "administrative civil penalties" at an informal public meeting that marries

Kafka's *The Trial*[2] to public dogpiling. Before the public meeting, respondents, facing millions of dollars of quasi-criminal penalties, are denied basic discovery, including the ability to subpoena documents and witnesses, notice of third parties who will give unsworn "testimony" against them at the public meeting, and the substance of the expected testimony. At the public meeting, hearsay, unauthenticated documents, and similarly unreliable materials may be considered, "regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." Cal. Code Regs. tit. 14, § 13065. Respondents like the Lents are not allowed to call or cross-examine witnesses under oath.

Perhaps worse, after a respondent gives a short defense presentation, third parties may emerge from the woodwork to give unsworn fact and quasi-expert testimony, respond to the defense presentation, and introduce new and unauthenticated materials, as happened here. Yet, respondents are prevented from responding, even though CCC Staff has that right.

After that, the Commission—an administrative body with a financial interest in the revenue it generates via its "unilateral administrative penalty" orders—deliberates on the fly and picks a number for the penalty (in this case, well over $ 4 million, which is more than four times what even CCC Staff recommended).

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[2] Franz Kafka, Der Process [The Trial], Vierlag die Schmiede (1925).

The practical reality is that the "informal" public meeting is a show trial with a preordained result. Indeed, this strange, new "unilateral administrative penalty" power appears to serve primarily as an *in terorrem* effect on property owners, discouraging any challenge to the CCC's onerous compliance demands. And here, the CCC made a very public example of the Lents to send a message. If the CCC's actions are allowed to stand, it is unlikely this Court will have another opportunity to intervene in the foreseeable future, as few, if any, affected property owners will be willing to challenge the CCC. *See* Pet. 34 n.33. The Court should step in now and put a stop to this novel variant of due process violation before it spreads, as this will likely be this Court's best chance to do so.

At a broader level this case is about whether bureaucratic expediency can override due process rights. The answer must be "no." This case provides an ideal vehicle for the Court to reaffirm due process rights guaranteed in the Constitution. California's dangerous experiment with using informal public meetings to impose millions of dollars of quasi-criminal penalties for putative "beach access" violations should be stopped.

## ARGUMENT

### I. THE "INFORMAL HEARING" AT THE PUBLIC MEETING WAS A RIGGED SHOW TRIAL.

California's unprecedented experiment with imposition of quasi-criminal penalties at public meetings has several features that, standing alone,

raise serious due process problems.[3] These features include denying respondents basic discovery rights, including notice of the "witnesses" against them; denying respondents any opportunity to respond to, let alone cross-examine, third parties who appear at the informal hearing to give adverse "testimony"; allowing the Commission—which has a financial interest in the revenue generated through imposition of administrative penalties—to adjudicate liability and determine the amount of the penalty; and denying respondents judicial review at a meaningful time. When combined, this toxic mixture is something out of a Kafkaesque nightmare.

### A. Lack of Basic Procedural Rights.

#### 1. Before the Public Meeting, Respondents are Denied Basic Discovery.

For starters, respondents like the Lents have no ability to conduct written discovery, subpoena documents, or subpoena or call witnesses—depriving

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[3] As Petitioner explains, the CCC's "penalty power is unprecedented. The California court of appeal below could identify no other administrative agency in the *nation* that has the ability to issue crushing financial penalties while guaranteeing the defendant only the barest of procedure safeguards." Pet. 3–4. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("Justice Holmes reminded us that 'a page of history is worth a volume of logic.' Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." (cleaned up; emphasis added)), *overruled*, 561 U.S. 477 (2010).

them of their lawful ability to make a defense. Nor did the Lents receive notice of the potential magnitude of penalties the Commission could impose, notwithstanding the relevance of this basic information to an ability-to-pay defense; the identity of parties who would testify against them; or the nature of the expected testimony. *See* Pet. 2–3. These limitations are highly prejudicial.

By way of example, the factual assertions contained in a letter a state agency (the California State Coastal Conservancy ("SCC")) and a so-called joint public agency (the Mountains Recreation and Conservation Authority ("MRCA")) sent to the CCC Chief of Enforcement in June 2016 were extensively relied on and cited in the CCC Staff Report recommending issuance of a cease-and-desist order and imposition of nearly $1 million in penalties.[4] Before the hearing, the Lents attempted to challenge the accuracy of the SCC & MRCA letter's allegations. Indeed, believing the SCC & MRCA letter's claims to be "totally inconsistent with the repeated written statements by the Conservancy attorney to the Lents' attorneys, with the repeated written statements of the Conservancy attorney to the Lents' attorneys that no

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[4] *See* Staff Report: Recommendations and Findings for Cease and Desist Order and Administrative Civil Penalty, Nos. CCC-16-CD-03, CCC-16-AP-01, Warren and Henny Lent, 20, 36, 38, 56, 57, 62, 72, 80, 93 (Nov. 18, 2016) [hereinafter "Staff Report"] (citing Exhibit 59 (Letter from SCC & MRCA to CCC (June 6, 2016)), *available at* https://documents.coastal.ca.gov/reports/2016/12/th5.3s-12-2016.pdf#page=303. Exhibit 59 is available online here: https://documents.coastal.ca.gov/reports/2016/12/th5.3s-12-2016.pdf#page=780.

determination had yet been made regarding the opening of the accessway"—an important point of contention, *see also* Pet. 13—the Lents' counsel requested "the opportunity to take discovery of the signatories of said letter" prior to the public meeting.[5] But to no avail.

### 2. At the Public Meeting, Respondents Cannot Meaningfully Respond to or Challenge the Allegations Against Them.

The procedures used at the informal public meeting are equally unfair. The CCC Staff Report recommending issuance of a cease-and-desist order and imposition of "administrative civil penalties" sums up the core "hearing procedures" this way:

> The Chair shall . . . have staff indicate what matters are parts of the record already, and . . . announce the rules of the proceeding, including time limits for presentations . . . . Staff shall then present the report and recommendation . . . , after which the alleged violator(s), or their representative(s), may present their position(s) . . . . The Chair may then recognize other interested persons, after which time staff typically responds to the

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[5] Email from Alan Block to Peter Allan et al., Subject: Request for Postponement of C&D Order No. CCC-16-CD-03 and Administrative Penalty, No. CCC-16-AP-01 (Nov. 23, 2016), https://documents.coastal.ca.gov/reports/2016/12/th5.3s-12-2016.pdf#page=44.

> testimony and any new evidence introduced.[6]

The report continues: "The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings."[7] After "the presentations are completed," the public hearing closes, except that "[t]he Commissioners may ask questions of any speaker at any time during the hearing or deliberations[.]"[8] Then, shortly thereafter, at that same informal public hearing, the Commission votes on the proposed relief.[9]

What does this mean when unpacked? Put simply, respondents in "beach access" administrative enforcement actions in which multi-million-dollar quasi-criminal penalties can be assessed have shockingly limited ability to contest the evidence against them at the informal public meeting, which lacks *any* hallmark of due process.

To begin, the lax evidentiary standard that obtains at the public meeting allows the Commission to consider highly unreliable materials and unsworn statements that would be inadmissible in civil proceedings. California regulations provide "the hearing need not be conducted according to technical rules relating to evidence and witnesses." Cal. Code

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[6] Staff Report, *supra* note 4, at 10–11.

[7] *Id.* at 11.

[8] *Id.*

[9] *See id.*

Regs. tit. 14, § 13065 (Evidence Rules); *see also* Cal. Code Regs. tit. 14, § 13186 ("Presentation and consideration of evidence at a hearing on a proposed cease and desist order shall be governed by the standards set forth in section 13065 of these regulations."). And unlike civil enforcement proceedings in a neutral court of law, under the CCC's administrative civil penalty process, "[a]ny relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, *regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions*." Cal. Code Regs. tit. 14, § 13065 (emphasis added).

Perhaps worse, third parties may show up to make unsworn statements in these proceedings, which may then be relied upon by the Commission in justifying imposition of liability and penalties. *See* Cal. Code Regs. tit. 14, § 13185(e)–(f). "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). Yet respondents are not even entitled to notice of *who* will show up at the informal public hearing to testify against them, let alone the substance of the allegations these third parties might make and copies of whatever materials they plan to introduce and use in their presentations.

Nor do respondents have any ability to challenge these unsworn statements. It is axiomatic that "'cross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth.'" *Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (citation omitted). Yet, respondents have no right of cross-

examination. Indeed, respondents are not even provided an opportunity—*any* opportunity—to in any way respond to the third parties' claims, even though CCC Staff has this right. *See* Cal. Code Regs. tit. 14, § 13185(e)–(f) ("[O]ther speakers may speak concerning the matter; [] the chair shall close the public hearing after the staff, all alleged violators, and the public have completed their presentations, except that the chair may allow staff to respond to particular points raised by other speakers[.]").

What this means is the only process the Lents received before being subjected to a $4,185,000 penalty[10] was an opportunity to submit to the Commission statements of objections and defenses, *see* Cal. Pub. Res. Code § 30812(a)–(b), attempting to respond to a voluminous 700-page-plus staff report (and exhibits) with proposed findings and recommendations the Lents received about two weeks before the hearing, and the ability to make an about-50-minute-long presentation at the public meeting.[11] *See* Pet. 11–13 & n.9. A variety of hostile third parties then came out of the woodwork and made unsworn statements against them that they were not allowed to address. *See* Pet. 13; Pet. App. A-10, B-70, B-72.

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[10] The Commission's penalty orders are immediately effective. *See* Pet. App. C-12.

[11] *See* Staff Report: Recommendations and Findings for Cease and Desist Order and Administrative Civil Penalty, CCC Nos. CCC-16-CD-03, CCC-16-AP-01, Warren M. and Henny S. Lent (Nov. 18, 2016), *available at* https://documents.coastal.ca.gov/reports/2016/12/th5.3s-12-2016.pdf#page=303.

### 3. The Public Meeting Was a Sham Hearing: A Video Is Worth Ten Thousand Words.

These due process violations are not abstract. This Court can see for itself what happened here in the video recording of the public meeting.[12] And it is worth watching. It took approximately an hour and a half for both Staff and the Lents to give their presentations.[13] Then the surprise third-party witnesses gave unsworn, uncross-examined fact and quasi-expert testimony against the Lents, including as to disputed material facts.[14] These third parties also successfully argued for enhanced penalties beyond that which even Staff recommended.[15] Both signatories of the late-disclosed SCC & MRCA letter to CCC enforcement staff—the same individuals that the Lents unsuccessfully sought to take discovery of—appeared at the public hearing as unsworn de facto

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[12] Cal. Coastal Comm'n Meeting, *available at* https://cal-span.org/unipage/?site=cal-span&owner=CCC&date=2016-12-08 (starting at 1:28).

[13] *See id.* at 1:28–3:03.

[14] *See id.* at 3:04–3:39.

[15] *See id.* at 3:18:00–3:39:50. *See also* Amicus Br. of Surfrider Found., *Lent et al. v. California Coastal Commission*, No. B292091, at 8–9 (Cal. Ct. App., filed July 15, 2020) ("At the hearing, Surfrider's representatives argued that the Commission should consider applying the full penalty amount of approximately $8.4 million, rather than the much smaller amount that Commission staff had initially proposed.").

fact witnesses.[16] *See* Pet. 13. Another third party introduced untested damages calculations and unauthenticated materials relating to alleged advertising regarding the Lents' rental of their property during her uninterrupted presentation.[17]

Before this, the Lents did not know who would testify against them. Nor did the Lents have a right to cross-examine under oath these third parties at the public meeting. *See* Pet. 2–3. In fact, the Lents had no opportunity to respond in any way to any of the unsworn statements by the hostile third parties, nor the materials they purported to introduce or their damages calculations far exceeding the penalty recommendations of Staff. Yet after this, *Staff* was allowed to speak again and give a supplemental presentation.[18]

The Commission deliberated for just 15 minutes before unanimously voting in favor of issuing a cease-and-desist order.[19] Immediately thereafter, a Commissioner moved for administrative civil

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[16] *See* Cal. Coastal Comm'n Meeting, *supra* note 12, at 3:03:50–3:07:26 (MRCA) (addressing subject matter of letter); 3:09:16–3:13:14 (SCC) (same). *See also* Pet. App. A-10 ("After the Lents' presentation, several individuals spoke, including the executive officer of the Conservancy. The executive officer stated that the only impediment to opening the easement for public access was the Lents' refusal to remove the structures[.]").

[17] *See* Cal. Coastal Comm'n Meeting, *supra* note 12, at 3:24:50–3:30:18.

[18] *See* Cal. Coastal Comm'n Meeting, *supra* note 12, at 3:39:50–3:42:50.

[19] *See id.* at 3:46–4:01:05.

penalties as recommended by Staff and discussions continued as to raising the amount of the penalty, in line with what the surprise third-party witnesses had advocated. Less than an hour later, the Commission began voting on the amount of the penalty,[20] ultimately settling at $4,185,000.[21] This entire process for imposing millions of dollars of quasi-criminal penalties took just under three-and-a-half hours. It took the Commission 50 minutes to determine to increase four-fold the "administrative civil penalty" from $950,000, as recommended by Staff, to $4,185,000.[22] *See also* Pet. 14.

This is not the process one would expect before government imposition of more than $4 million in quasi-criminal penalties against property owners. And the video of the proceeding poignantly lays bare the due process problems here in a way that no cold, sterile record could.

### B. The Commission Has a Financial Interest in Imposing Draconian Penalties.

As the video of the public meeting shows, issuance of a cease-and-desist order and imposition of an administrative penalty was a *fait accompli*—unsurprising given that the CCC is prosecutor and judge in its own cause. The only question was how much the Commission was going to award itself—with debate among the Commissioners focusing on how

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[20] *See id.* at 4:46:30.

[21] *See id.* at 4:48:45–4:50:40.

[22] The trial court correctly found that the Commission imposed punitive "quasi-criminal" penalties. *See* Pet. App. B-8, B-69.

much to increase the administrative penalty recommended by Staff. That, too, is unsurprising given the Commission's incentive to levy penalties as a source of revenue to fund its operations.[23]

The way the scheme works is that the revenues the CCC extracts from property owners like the Lents go into an account administered by the Coastal Conservancy.[24] *See* Cal. Pub. Res. Code § 30821(j) ("Revenues derived pursuant to this section shall be deposited into the Violation Remediation Account of the Coastal Conservancy Fund and expended pursuant to Section 30823."). These funds "shall be expended for carrying out the provisions of this division [i.e., the Coastal Act], when appropriated by the Legislature." Cal. Pub. Res. Code § 30823.[25] The CCC is tasked with primary responsibility for the implementation of the provisions of" the Coastal Act. Cal. Pub. Res. Code § 30330. Thus, the same Commissioners who decide liability and set the administrative penalty "know the revenue from penalties imposed under section 30821 will be used (if at all) to carry out the provisions of the Coastal Act,

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[23] The decision below recognized that "[t]he Coastal Act may give the commissioners at least some incentive to impose substantial fines under section 30821." Pet. App. A-52.

[24] *See also* CCC, Coastal Act Section 30821 Implementation Progress Report, 15 (Feb. 2018) (stating that "California Coastal Conservancy's Violation Remediation Account . . . is managed with input from Commission staff."), https://documents.coastal.ca.gov/reports/2018/2/th9/th9-2-2018-report.pdf

[25] A majority of Commissioners are appointed by the legislature. *See* Cal. Pub. Res. Code § 30301(d)–(e).

which by statute they are required to implement[.]" Pet. App. A-49.

As the Commission itself has explained, "the administrative penalties that the Commission has imposed, or is collecting through a mutual settlement of liability under Section 30821, have . . . resulted in significant funds that will support public access and recreation projects along the California coast."[26] By all indications, the penalties are also used, in part, to fund the CCC's enforcement activities.[27]

### C. Lack of Meaningful Judicial Review.

Judicial review of Commission cease-and-desist and administrative penalty orders is also exceedingly limited. Review may only be obtained "by filing a petition for a writ of mandate in accordance with Section 1094.5 of the [California] Code of Civil Procedure" after liability and penalties have been imposed. Cal. Pub. Res. Code § 30801. The scope of review in these administrative mandamus actions is narrow and deferential, "extend[ing] to the questions whether the respondent has proceeded without, or in

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[26] Report to California Legislature on Implementation of Coastal Commission Administrative Penalty Authority From 2015-2018, at 24 (Jan. 2019) [hereinafter "Administrative Penalty Report"], https://documents.coastal.ca.gov/reports/2019/2/W8/W8-2-2019.pdf.

[27] *See, e.g.,* CCC, Enacted Budget for FY 2020-21/Upcoming FY 2021-22 Budget, (Dec. 2020) ("The FY 2020-21 Budget authorizes an additional three years of funding for two key Enforcement positions from the Violation Remediation Account[,] . . . which holds fines and penalties from Coastal Act violations."), https://www.coastal.ca.gov/budget/.

excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." Cal. Civ. Proc. Code § 1094.5(b). The deferential "substantial evidence" standard applies. *See* Cal. Civ. Proc. Code § 1094.5 ("[A]buse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.").

Perhaps worse, the timing of judicial review means that administrative penalties, which accrue daily during the period of investigation and settlement discussions, can continue to accrue for a long period of time before liability is imposed at the public meeting. *Cf. Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring) ("And if the owners want their day in court to show that their lot does not include covered wetlands, well, as a practical matter, that is just too bad. Until the EPA sues them, they are blocked from access to the courts, and the EPA may wait as long as it wants before deciding to sue."). By the time the Commission holds its public meeting "fines may easily have reached the millions. In a Nation that values due process, not to mention private property, such treatment is unthinkable." *Id.* (Alito, J., concurring).

## II. THE ACT'S ADMINISTRATIVE PENALTY SCHEME VIOLATES DUE PROCESS.

Under the Fourteenth Amendment, no person may be deprived of "life, liberty, or property, without due

process of law."[28] U.S. Const. amend. XIV, § 1; *accord* U.S. Const. amend. V. *See also Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and concurring in judgment). It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). "This [also] applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). And at a minimum, due process requires an "opportunity to be heard . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation and internal quotation marks omitted).

That did not happen here. Nor could it, as the neutrality and independence due process requires cannot be replicated within novel administrative bodies like the CCC. *Cf. Williams v. Pennsylvania,* 136 S. Ct. 1899, 1905 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). That is because when, as here, quasi-criminal penalties are at issue, due process requires a full and fair hearing in

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[28] The Fourteenth Amendment makes the Eighth Amendment's Excessive Fines Clause applicable against the states. *See Timbs v. Indiana,* 139 S. Ct. 682, 686–87 (2019). The Fourteenth Amendment's text, structure, and history also shows that it incorporates the Seventh Amendment's jury-trial right against the states. *See generally id.* at 692–93 (Thomas, J., concurring in the judgment). Both were violated here.

the *first instance* in a neutral, independent court of law, with all of the procedural safeguards that entails.

### A. The Act Violates Due Process by Foreclosing Meaningful Judicial Review.

The Act denies affected property owners a safe pathway to meaningful judicial review by essentially requiring them to risk their homes as a condition of challenging the CCC in court. The CCC's penalty authority for beach-access violations gives the Commission the ability to coerce compliance with its demands and extract payments through consent orders. That is by design. As the CCC has stated: "The daily accrual of penalties, coupled with the potential for a high daily penalty amount, provides a strong incentive for a violator to comply quickly, as the total potential liability may increase considerably each day that the violation remains."[29]

According to the CCC, its settlement rate for beach-access cases "since 2014 can be attributed, in part, to Section 30821. The prospect of daily administrative penalties under Section 30821, which can, theoretically, total over $4 million per year per violation, provides a strong incentive for violators to settle their cases expeditiously."[30] This means that property owners like the Lents must literally bet their house to get their day in court. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,* 561 U.S. 477, 490 (2010) (Courts "normally do not require plaintiffs to

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[29] Administrative Penalty Report, *supra* note 26, at 6.

[30] *Id.* at 20.

bet the farm . . . by taking the violative action before testing the validity of the law[.]" (cleaned up)).

This is precisely the "situation in which compliance is sufficiently onerous and coercive penalties sufficiently potent that a constitutionally intolerable choice might be presented." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 218 (1994). The right to judicial review "is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law." *Wadley S. Ry. Co. v. Georgia*, 235 U.S. 651, 661 (1915). And "[t]he price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open." *Life & Cas. Ins. Co. v. McCray*, 291 U.S. 566, 574–75 (1934) (Cardozo, J.). So too here.

### B. Due Process Bars Imposition of Quasi-Criminal Penalties Through an Informal Administrative Process.

More fundamentally, due process requires severe penalties can only be obtained through a civil enforcement action before an independent, unbiased judge—*and in a court of law*.[31] "Before the

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[31] *See also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers

Government can impose severe civil and criminal penalties; the defendant is entitled to a *full and fair hearing* before an impartial tribunal '*at a meaningful time and in a meaningful manner*.'" *TVA v. Whitman*, 336 F.3d 1236, 1258 (11th Cir. 2003) (quoting *Armstrong*, 380 U.S. at 552) (emphasis added). The Lents were denied that basic right.

California is not free to dispense with its citizens' basic due process rights by legislative fiat. "The Framers of the Fourteenth Amendment understood the Due Process Clause to ensure that the states would provide prevailing notions of 'due process of law' to all persons. Due process of law limited a legislature's power to provide alternative judicial procedures[.]" Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672, 1801 (2012). As Professors Chapman and McConnell explained:

> The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to

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guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking."); *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Administrative adjudication of individual disputes is usually accompanied by deferential review. . . . That agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment.").

> deprive a person of liberty or property. . . . The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness.

*Id.* at 1781–82.[32] The Commission's administrative penalty process plainly fails this test.

"Fundamentally, . . . [due process] was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies[.]" *Id.* at 1808. At the time it was ratified, the Fourteenth Amendment was "universally understood to guarantee individual rights of legal process that *only courts* could provide." *Id.* at 1727 (emphasis added).

This means that due process bars administrative bodies from imposing quasi-criminal penalties—whether labeled as "administrative civil penalties" or something else—through administrative processes. Period. Underscoring this, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412,

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[32] The Fourteenth Amendment "included a Due Process Clause that was unambiguously aimed at the states, but otherwise matched the language of the Fifth Amendment word for word: 'No State shall . . . deprive any person of life, liberty, or property without due process of law.'"[32] *Id.* at 1726.

422 (1987).[33] *See also Sessions v. Dimaya*, 138 S. Ct. at 1224 (Gorsuch, J., concurring in part and concurring in judgment) ("[I]n my view the weight of the historical evidence shows that the [Due Process] clause sought to ensure that the people's rights are never any less secure against governmental invasion than they were at common law.").

The CCC's informal public meeting process for imposing millions of dollars in quasi-criminal penalties plainly violates the Fourteenth Amendment's guarantee of procedural due process. Given the shocking absence of procedural protections in the CCC's administrative penalty scheme, as well as the egregious due process violations that occurred here, this case provides an ideal vehicle for this Court to make clear that due process prohibits administrative bodies from unilaterally depriving persons of property except as adjudicated by independent judicial bodies.

## CONCLUSION

This Court should grant the petition.

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[33] *See also Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 714–15 (2015) (Thomas, J., dissenting) ("Nineteenth-century American jurisprudence confirms that an exercise of the judicial power was thought to be necessary for the disposition of private, but not public, rights."). *Cf. Nollan v. Cal. Coastal Com*, 483 U.S. 825, 833 n.2 (1987) ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'").

Respectfully submitted,

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