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June 1, 2021

The Honorable Chief Justice Tani G. Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Lent v. California Coastal Commission*, No. S268762

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Towards those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. Cato has also participated as *amicus curiae* in several due process and excessive fines cases before the U.S. Supreme Court, including *Timbs v. Indiana* (2019); *Johnson v. United States* (2014); *Kaley v. United States* (2014); and *Alvarez v. Smith* (2009). It has participated as *amicus curiae* in several cases before this Court, including *Delano Farms Co. v. Cal. Table Grape Comm'n* (Cal. 2018); *Nordstrom, Inc. v. Gordon* (Cal. 2017); and *Gerawan Farm'g v. Agric. Labor Relations Bd.* (Cal. 2017).

This case interests Cato because the California Coastal Commission's fine against the Lents is a violation of the couple's due process rights and the Excessive Fines Clause. It is an ideal vehicle for this court to align its doctrines (and California law) in these areas with those of the U.S. Supreme Court. This Court should grant review to correct the lower court's erroneous interpretation of *Matthews v. Eldridge* (1976), to correct its misunderstanding of excessive-fines case law, and because failure to protect the Lents from flawed process and an excessive fine would give even greater incentive to the California Coastal Commission to levy such grossly disproportionate fines, without due process.

I. THE COURT SHOULD GRANT REVIEW TO CORRECT THE LOWER COURT'S ERRONEOUS INTERPETATION OF *MATHEWS V. ELRIDGE* (1976)

In *Mathews v. Eldridge*, the U.S. Supreme Court held, *inter alia*, that due process, even in the quasi-judicial context, "requires consideration of . . . the private interest that will be affected by the official action." 424 U.S. 319, 335 (1976). Yet the court below reasoned that the California Coastal Commission (CCC) meets this requirement—or the requirement at least becomes irrelevant—when the *potential* punishment to be imposed is *de minimis*, irrespective of both the actual fine levied or of the fining agency's decision to charge someone far and above what is reasonable. *Lent v. Cal. Coastal Comm'n*, 62 Cal. App. 5th 812, 844 (Apr. 5, 2021).

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By this logic, the CCC can impose fines up to the statutory maximum of $20,000,000, confident that it will avoid *Mathews* scrutiny just by giving a pre-hearing stipulation to the defendant that the fine *could be* as little as one dollar. Under this theory, a fine will *never* trigger *Mathews*'s first factor if there is no mandated minimum before a hearing. As the court below put it, "[w]hile the Commission certainly has the potential to impose significant penalties, this potential has less relevance to the Lents' facial challenge because section 30821 does not *require* the commission to impose a minimum penalty." *Lent*, 62 Cal. App. 5th at 844 (emphasis added).

This reasoning departs from the U.S. Supreme Court's procedural due process doctrine. "The extent to which procedural due process must be afforded the recipient [of Social Security income] is influenced by the extent to which he *may* be condemned to suffer grievous loss." *Goldberg v, Kelly*, 397 U.S. 254, 263 (1970) (emphasis added) (cleaned up). In *Mathews*, the Court wrote that "the degree of *potential* deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process." 424 U.S. at 341 (internal citation omitted). While cutting procedural corners is sometimes justified—as when the target of a hearing is not acting in good faith—that is not the case here.

The Lents have always acted in good faith, "ma[king] clear that they were prepared to remove any structures that proved to be inconsistent with a feasible plan to develop the easement," and even "provid[ing] a gate-key to the California Coastal Conservancy, the then-holder of the [access] easement, to facilitate the accessway's development." Pet. Br. at 21. None of the CCC's procedural corner-cutting was in response to the Lents' conduct but appears to have been part of an ulterior effort to turn the screw. These deprivations include "giv[ing] no notice of those who may testify at the hearing," "no right to cross-examine witnesses, no power to demand testimony under oath or to exclude hearsay or other unreliable testimony." *Id.* at 24. With a fine that *turned out* to be $4.185 million, these shortcomings run afoul of the *Mathews* "private interest" factor.

II. THE COURT SHOULD GRANT REVIEW TO CORRECT THE LOWER COURT'S MISUNDERSTANDING OF EXCESSIVE-FINES CASE LAW, INCLUDING *UNITED STATES V. BAJAKAJIAN* (1998)

A. The Historical Treatment of the Excessive Fines Clause Was as a Safeguard Against the Precise Sort of Governmental Action Taken Here

The historical treatment of the Eight Amendment's Excessive Fines Clause also cuts in the Lents' favor. In *Timbs v. Indiana*, which for the first time applied the clause against state-level action, the U.S. Supreme Court surveyed the clause's "venerable lineage" from Magna Carta to the Bill of Rights. The Court noted "the protection against excessive fines has been a constant shield throughout Anglo-American history." Without it, the Court reasoned, such fines could "undermine other constitutional liberties," including chilling speech. 139 S. Ct. 682, 689 (2019).

Early American jurists believed that the Framers, though themselves largely silent on the specific meaning of "excessive fines," intended the clause to be rigorous. In *Commonwealth v. Morrison*, the Kentucky Court of Appeals held that while "no definite criterion is furnished by the constitution or bill of rights by which to ascertain what fine would or would not be excessive . . .

the fine imposed should bear a just proportion to the offense committed," a formulation that should bear in mind "the situation, circumstances and character of the offender"—viz., their ability to pay and need to maintain a livelihood. 9 Ky. (2 A.K. Marsh.) 75, 99 (1819) (as cited in Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, Hastings Const. L.Q. 833, 871 (2013)).

Add to this Webster's contemporary definition of "excessive" in his first volume: (a) "[b]eyond any given degree, measure or limit, or beyond the common measure or proportion . . ."; and (b) "[b]eyond the established laws of morality and religion, or *beyond the bounds of justice, fitness, propriety, expedience or utility*." 1 Noah Webster, *An American Dictionary of the English Language* (1828) (unpaginated) (emphasis added). In the early republic, then, the commonly held definition of an "excessive" fine would have included imposing a dollar amount that did not secure retribution for victims (justice), assist in judicial economy (expedience), nor serve a bona fide remedial purpose (utility)—a penalty for penalty's sake.

Nothing in the historical record suggests that an excessive fine loses its excessiveness, as either a moral or constitutional matter, simply because the levier of the fine has the discretion to moderate it. If in the end it imposes a penalty for penalty's sake, or, worse still, to fatten its own wallet (as the CCC attempts to do here), the Excessive Fines Clause should prohibit it.

B. The Fine Levied Against the Lents Is "Grossly Disproportional to the Gravity" of Their "Offense"

Since *United States v. Bajakajian*, 524 U.S. 321 (1998), the Excessive Fines Clause is no longer "a dead letter." McLean, *supra*, at 833 n.2 (quoting Edward Samuel Corwin, et al., *The Constitution and What it Means Today* 432 (1978)). In *Bajakajian*, the U.S. Supreme Court ruled an asset forfeiture excessive, concluding that "the text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry," and citing Webster's and Samuel Johnson's definitions for support. 524 U.S. at 335 (cleaned up). *Bajakajian* is not important just because it was the first time the Supreme Court found an economic penalty to be excessive. It's also significant in having blurred the false distinction between criminal and civil confiscations, focusing instead on whether the seizure is punitive or nonpunitive—*i.e.*, utilitarian or remedial. *Id.* at 334 ("[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense."). The meaning of "excessive" changes depending on whether the purpose is to punish or to remedy—to balance costs and benefits among individuals and between individuals and the state.

Here, the court below held that the Lents' fine was remedial, reasoning that their reluctance to clearing the accessway without first asserting their rights "delayed the public's ability to use the easement to access the beach" along a three-mile stretch, and that "[t]here is no question the state places a significant value on the public's right to access the beach." *Lent*, 62 Cal. App. at 858. The court reached this conclusion despite several commissioners' determining, wrongly, that the Lents' conduct was "particularly egregious and warranted a penalty higher than the [CCC] staff's recommendation." *Id.* at 830. And even if the hard task of determining the exact dollar-value of

the harm caused "does not show the penalty is not proportional to the Lents' violation," *id.* at 859, a fine that is millions more than what is recommended before a hearing is strong indication of disproportionality. The court's odd invocation of *Ojavan Investors v. Cal. Coastal Comm'n*, 54 Cal. App. 4th 373 (1997) ["*Ojavan II*"], to support this reasoning does not in fact support it. There, the $9.5 million fine in that case was levied years before the California legislature enacted Section 30821, and it was drastic because the defendant behaved poorly by simply ignoring the terms of a permit prohibiting division of a 54-lot parcel and "attempt[ing] to resell them as individual lots." *Lent*, 62 Cal. App. at 859 (citing *Ojavan II*, 54 Cal. App. 4th 373, 378).

The CCC provided no evidence as to how s huge fine serves to remedy the Lents' alleged failure to provide beach "access." While such costs are sometimes difficult to calculate, the more than four million dollars assessed here is not even in the ballpark. Given this amount and the commissioners' views, this Court can assuredly conclude that the fine is punitive, and thus "grossly disproportional to the gravity" of the "offense." *Bajakajian*, 524 U.S. at 334.

III. FAILURE TO PROTECT THE LENTS FROM FLAWED PROCESS AND AN EXCESSIVE FINE WILL GIVE THE CALIFORNIA COASTAL COMMISSION AN INCENTIVE TO LEVY "GROSSLY DISPROPORTIONAL" FINES, WITHOUT DUE PROCESS, AGAINST FUTURE "OFFENDERS"

Failure to render correct readings of *Mathews* and *Bajakajian* here will redound to countless future hearings in which the CCC may impose an enormous penalty. The need for the Excessive Fines Clause is at its greatest when an agency has the power to impose fines that will line its own pockets without the approval of a disinterested adjudicator. Section 38201 permits the CCC to do this. And the CCC's history reveals a tendency to push fines and other penalties against accused offenders to the absolute allowable limit, regardless of the true gravity of the offense. *See generally* J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. Envtl. L. & Pol'y 247 (2004). This case offers the Court an opportunity to draw a literal line in the littoral sand, making clear that the purpose of Section 30821 is to simplify enforcement of the Coastal Act, not to extract more from defendants than their ostensible violations warrant.

Respectfully Submitted,

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DECLARATION OF SERVICE

Lent v. California Coastal Commission, No. S268762
Los Angeles Superior Court, No. BS167531

I, Sam Spiegelman, am a resident of the District of Columbia, over the age of eighteen years, and not a party to the above-titled action. I am also a member of the District of Columbia Bar (ID 1658515). My business address is Cato Institute, 1000 Massachusetts Ave., NW, Washington, D.C. 20001, sspiegelman@cato.org, (201) 314-9505.

On June 1, 2021, a true copy of this ***AMICUS CURIAE* LETTER IN SUPPORT OF PETITION FOR REVIEW** was electronically filed with the Court through Truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's e-filing system. Those who are not registered, including the trial court and court of appeal listed below, will receive a hard copy via U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the USPS in Washington, D.C.

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I declare under penalty of perjury under the laws of the District of Columbia that the foregoing is true and correct. Executed on this 1st day of June 2021, at Washington, District of Columbia.

/s/ Sam Spiegelman
Sam Spiegelman