IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 7

No. B292091

WARREN M. LENT, et al.,
Plaintiffs – Appellants, Cross-Appellees,

v.

CALIFORNIA COASTAL COMMISSION,
Defendant – Appellee, Cross-Appellant,

CALIFORNIA STATE COASTAL CONSERVANCY
and MOUNTAINS RECREATION AND
CONSERVATION AUTHORITY,
Real Parties in Interest.

On Appeal from the Superior Court of Los Angeles
(Case No. BS167531, Honorable James C. Chalfant, Judge)

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL SECOND **APPELLATE DISTRICT, DIVISION** 7	COURT OF APPEAL CASE NUMBER: B292091
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 235101 NAME: Damien M. Schiff FIRM NAME: Pacific Legal Foundation STREET ADDRESS: 930 G Street CITY: Sacramento STATE: CA ZIP CODE: 95814 TELEPHONE NO.: (916) 419-7111 FAX NO.: (916) 419-7747 E-MAIL ADDRESS: dschiff@pacificlegal.org ATTORNEY FOR (*name*): Appellants Warren M. Lent, et al.	SUPERIOR COURT CASE NUMBER: BS167531
APPELLANT/ PETITIONER: WARREN M. LENT, et al. RESPONDENT/ REAL PARTY IN INTEREST: CALIFORNIA COASTAL COMMISSION	

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(Check one): ☐ INITIAL CERTIFICATE ☒ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Appellants Warren M. Lent, et al.

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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(1)		
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Date: February 12, 2019

Damien M. Schiff
(TYPE OR PRINT NAME)

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INTRODUCTION

In 2002, Appellants Warren and Henny Lent bought a beach-front house on Pacific Coast Highway (PCH) in Malibu. Since the early 1980s when the house was built, the side yard had a narrow stairway which provided emergency, secondary egress. The stairway led down to a wood landing, which covered a massive, County-owned storm-water pipe that runs along the side yard and is perpendicular to PCH. Naturally, like most every house, the side yard also had a gate barring entry from the street. Among other things, the gate ensured that passersby did not fall onto the wood landing, which was a dangerous six-to-seven feet down from the street as well as another 14 feet or so above the sandy beach. Before buying the property, the Lents performed their due diligence and uncovered no issues with the side yard.

That all changed five years after the Lents bought the house. In 2007, Respondent California Coastal Commission began alleging that the side yard improvements, installed before the Lents acquired the property, were unpermitted and blocked a publically owned, five-foot-wide easement located over part of the wood landing and fully encompassed by the County storm drain. Decades prior, as a condition of approving a permit to build the

house, the Commission had coerced the Lents' predecessors in interest to convey a non-exclusive easement for potential future development into a public access way.[1] Real-party-in-interest California Coastal Conservancy accepted the easement in 1982. Due to a lack of interest and resources, a complicated topography, and serious engineering challenges to building the elaborate structures necessary to allow safe public access across the Lents' side yard, the Conservancy did nothing with the easement *for 36 years*. Recently, the Conservancy conveyed the easement to Real-party-in-interest Mountains Recreation and Conservation Authority.[2] But, despite expressions of interest in developing the easement, neither agency has produced a final plan for

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[1] The Commission's easement requirement as a condition on development of the property was unconstitutional, because there was no essential nexus between the construction of the original property owners' home and an increased need for public access to the beach. *See generally Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (describing the Commission's easement-demand policy as "'an out-and-out plan of extortion'") (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)). Unfortunately, too much time had passed by the time *Nollan* was decided for the Lents' predecessors-in-interest to vindicate their constitutional rights.

[2] The transferred ownership of the easement does not affect review of the statute and administrative orders that are the subject of this appeal, which pertains to the Commission's authority, not to the issue of which entity holds the easement.

developing the easement into a public access way, much less embarked upon that effort.

Although forced by the Commission's belated claim to work in the administrative process with decades-old permit files and the fading memories of witnesses (and sometimes worse than fading—two had already died by the time of the hearing before the Commission), the Lents were able to present records showing that the allegedly unpermitted structures were in fact permitted. They nevertheless agreed to remove the fence and gate at a moment's notice, once the easement was ready to be developed, and gave the Conservancy and Authority keys to the gate. The Lents also tried to work with the agencies to find an accommodation for their stairway, which lay only partly in the non-exclusive easement and which, as noted above, provided important emergency egress to the home's second-floor occupants. But the agencies were not interested.

Following an administrative hearing that failed to satisfy the Lents' fundamental due process rights, the Commission issued a cease-and-desist order requiring immediate removal of the structures. The Commission also issued a "penalty" order under a then newly enacted Coastal Act provision—Public

Resources Code section 30821. The order imposed a crushing *$4,185,000 fine* against the Lents—nearly four-and-half-times more than the Commission staff's recommendation—partly to punish the Lents for spending "too much time" trying to negotiate a reasonable resolution to the dispute.

The Lents thereupon sued the Commission, challenging the cease-and-desist and penalty orders, along with the statute authorizing the penalty order. Finding due process problems with the penalty order, the trial court issued a writ ordering the Commission to set it aside. But the trial court upheld the cease-and-desist order and rejected the Lents' other constitutional challenges to the penalty statute and penalty order. The Lents have now appealed and, since entry of the trial court's judgment, have removed the stairway, wood landing, and gate.

The cease-and-desist order should be set aside. There is no substantial evidence in the record to support the Commission's allegations that the structures were unpermitted or that the structures in any way interfered with the non-exclusive public easement. Further, even if the structures were improper (which they were not), the Commission would still be barred under the doctrine of laches from pursuing a belated enforcement action

against the Lents. Finally, under the plain terms of section 30810 of the Public Resources Code, cease-and-desist orders may be issued only against persons who "undertake" illegal development. An entirely separate provision—section 30811, requiring *restoration*—applies to persons who acquire allegedly unpermitted development. Here, it is undisputed that the Lents did not undertake *any* unlawful development; therefore, a cease-and-desist order cannot lie against them.

Moreover, section 30821, and the penalty order issued thereunder against the Lents, are unconstitutional.

As the trial court itself recognized in its ruling, section 30821 authorizes "quasi-criminal" penalties. Yet the statute explicitly imports the informal procedures and lax rules of evidence applicable to *civil* proceedings before the Commission. Consequently, section 30821 violates the Due Process Clause because it deprives quasi-criminally accused persons, such as the Lents, of the most basic procedural safeguards guaranteed by the Constitution—including the right to demand testimony under oath and to cross-examine witnesses.

Further, the statute violates due process because it deprives the accused, like the Lents, of an unbiased tribunal. Section 30821 hands adjudicatory authority to the Commission, which has an unconstitutional financial incentive to impose exorbitant penalties against property owners. All such penalties are placed in an account over which the Commission exercises substantial control and which directly advances the agency's own statutorily defined goal of maximizing public access to the coast.

Finally, the penalty order is unconstitutionally excessive. The failure to remove a protective gate, stairway, and other harmless residential fixtures, when that failure (i) caused no injury to the public's health or safety, (ii) did not impede any existing public access, (iii) was the responsibility of predecessors-in-interest, and (iv) was maintained because of a good-faith belief in the legality of those structures, cannot support a nearly $4.2 million fine. Such a penalty is grossly disproportionate and therefore unconstitutional.

I.

FACTUAL & PROCEDURAL BACKGROUND

A. The Lents Purchase a Fully Improved, 20-Year-Old House with No Indication of Permitting Issues

In 2002, the Lents purchased a two-bedroom house at 20802 PCH. AR 2307. The house's construction had been completed in 1983, and included a stairway on its eastern side. The stairway ran from a second-story door down ten feet to a wood landing and provided secondary egress from the house. *Id.* 2331, 3027. The wood landing lay atop a massive concrete-encased storm drain, owned by Los Angeles County, which runs from beyond PCH out toward the beach. *Id.* 2553, 2677-78. There is a six-to-seven-foot drop from PCH down onto the storm drain area that was covered by the wood landing; because of that precipitous drop, prior owners had installed a fence and gate (hereinafter, just "gate") to prevent accidental—and potentially life-threatening—falls onto that storm drain area. *See id.* 2331-32, 3355. The landing, stairway, gate, wood landing, a few planter boxes, and a mailbox (collectively, "the Structures")[3] were

[3] After the trial court had issued its decision upholding the cease-and-desist order, the parties agreed that the Lents could remove all of the Structures without waiving their right to continue

put in place two decades before the Lents acquired the property. *Id.* 2633-37, 2656-59, 2661. When the Lents purchased the property, they had no indication that the Structures were ever an issue for the Commission or any other agency. *Id.* 2331.

The stairway and wood landing were partially located in an area of the Lents' property that is burdened by a five-foot-wide public-access easement runs from PCH to the mean high-tide line, and which encompasses the entire length and width of the storm drain. *Id.* 2553. As a condition of obtaining a coastal development permit for the house,[4] the Lents' predecessors were required to make an offer to dedicate that easement, which the Conservancy accepted in 1982. *Id.* 2307. The easement, if developed and opened up to the public, could be used by the public only to "pass and repass." *Id.* 2352. There is no dispute that the easement is non-exclusive, meaning that "the owner of

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challenging the order on appeal. Appellants' App. Vol. II, at 330 (Judgment ¶ 3). In September, 2018, the Lents removed the Structures except for the gate, which had to be replaced by the Authority. Not until January 3, 2019, did that agency finally install its new gate. If the cease-and-desist order ultimately is set aside, the Lents intend to restore the Structures.

[4] The Coastal Act generally requires such a permit for any "development" occurring within the coastal zone. *See* Pub. Res. Code § 30600(a).

the servient tenement [here, the Lents] may make any use of the land that does not interfere unreasonably with the easement." *Main Street Plaza v. Cartwright & Main, LLC*, 194 Cal. App. 4th 1044, 1054 (2011). *See* AR 3101 (Comm'n staff report) ("To be clear, . . . the Commission does not take the position, that the public easement . . . is an exclusive easement."). The stairway's base lay 27 inches into the five-foot-wide easement, allowing anyone to pass and repass if and when the elaborate structures necessary to provide public access are ever built. *Id.* 4215. At the time of the hearing before the Commission, there was no plan in place to develop and open the easement. AR 4225. That remains true today.

At present, the easement consists of an undeveloped six-to-seven-foot drop from the sidewalk on PCH to the storm drain area on the Lents' property. AR 2331. The easement area runs along the storm drain area to its terminus, where it abruptly ends with a nearly fourteen-foot drop to the beach. AR 2554. Consequently, without a constructed access way dramatically altering the topography of the easement area, "pass and repass"

is not and will never be possible, *regardless of the Structures' presence*.[5] AR 2555-56, 2672-74.

B. State Agencies Surprise the Lents with an Enforcement Action Concerning the Structures

The Conservancy has the authority to develop and maintain easements for the purpose of providing public access, but it does not have to do so if, "in its estimation, the benefits of public use would be outweighed by the costs of development and maintenance." Pub. Res. Code § 31404. That appears to have been the Conservancy's "estimation," as for decades after it had accepted the dedication, it took no action to try and develop and open the easement at the Lents' home. The Conservancy did go to the property in 1993 for a routine inspection of its easement, and it expressly acknowledged the stairway's existence. AR 2431 ("There are steps situated behind the gate which lead to the beach.").[6] In a written report following inspection, it mentioned

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[5] As the holder of the easement, the Conservancy was responsible for developing and opening up the easement to the public. *See* AR 2315-16. In the 36 years that it held the easement, the Conservancy failed to do so.

[6] The stairway (or "steps," as observed by the Conservancy's inspector) did not, however, go down to the beach; they terminated at the wood landing. AR 2483-84, 4191.

the gate as "blocking" the easement, but made no similar characterization of the stairway. *See* AR 2428-30.

The Conservancy first indicated an interest in doing something with the easement in 2008, when it had the easement formally surveyed to help assess the feasibility of constructing a public walkway there. AR 2037. The Conservancy went on to hire a landscape architect firm, Bionic, which in 2010 drew up conceptual plans for a walkway. *Id.* 2038-60. A couple of years later, the Conservancy approved a "Public Works Plan," partnering with the Authority, to evaluate the feasibility of developing each of the unopened easements in Malibu, including the easement on the Lents' property. AR 2092-2103. Under that Plan, no specific easement can be opened until *after* specific design and engineering plans have been vetted at public hearings, and approved by the appropriate land-use authorities with the public's input. *Id.* 2680. Importantly, the Conservancy is required to give affected property owners (like the Lents) notice of "any proposed Conservancy action related to the development, enhancement, maintenance, restoration, or closing of public access on, over or across [those owners'] real property." *Id.* 2100 (citation omitted). There is no evidence whatsoever that the

Conservancy has gone beyond its 2010 "conceptual plans," and adopted design and engineering plans for the easement on the Lents' property. AR 4225. Further, there is no substantial evidence to support the conclusion that constructing the extensive facilities necessary to open the easement—without unduly burdening the massive storm drain easement—would even be *feasible* from an engineering and cost perspective. AR 2396, 2662-67. Indeed, in their unsuccessful efforts to oppose the Lents' request for a stay of the cease-and-desist order on the ground that a feasible way existed to develop a pathway in the easement area anyway, the agencies were utterly incapable of producing any evidence that such a feasible plan existed. *See* Appellants' App. Vol. I, at 79 (trial court order granting stay of cease-and-desist order until the Commission "applies for an ex parte application to lift the stay with a concrete plan for approval hearing"); *id.* at 280 (denying Commission's ex parte application to lift stay).

It is the Commission, however, that is at the center of this dispute, as it was the agency that approved the coastal development permit for the house. AR 3013. The Lents maintain that the Structures were approved as part of that permit, and

that the Commission had knowledge of the Structures at the time. *Id.* 2633-37, 2656-59, 2661. The Commission certainly ought to have known about the Structures *at the latest* by 1996, when it approved fencing on the street side of the house on PCH. *Id.* 448-60. Yet it was only in 2007 that Commission staff contacted the Lents about what the staff considered to be an unpermitted gate at the property blocking access to the easement. *Id.* 2369. Three years later, in 2010, Commission staff notified the Lents that their *stairway* was also unpermitted. *Id.* 926. The Lents were shocked by these allegations. As innocent purchasers, they were unaware of any claim of unpermitted activity occurring 25 years earlier. *Id.* 2331. But the Commission at least agreed to allow the gate to remain until construction of a public walkway commenced. *Id.* 2331-32, 2485.

Between 2007 and 2011, the Lents tried, unsuccessfully, to negotiate with the Commission and the Conservancy. AR 797-834, 841-49, 863-955. Talks picked up again in late 2013, AR 2332, but in 2015, Commission staff raised for the first time the specter of a massive penalty as a condition to settlement. *See* AR 2760. Negotiations ultimately broke down over that issue, with staff demanding $600,000 and immediate destruction of the

Structures to "settle" the matter. *Id.* 925-28. Meanwhile, the Conservancy still produced no design or engineering plans. AR 2758.

C. Following a Hearing, the Commission Imposes a $4.185 Million Penalty Against the Lents and Orders the Structures' Removal

After settlement negotiations between the Lents and Commission staff had broken down, the Commission set a hearing for December 8, 2016, on the questions of whether to issue a cease-and-desist order and a penalty order. The hearing began with a roughly one-hour presentation from Commission staff. AR 4139-87. The Lents were then granted 50 minutes in which to respond. AR 4187-4217.

Following the presentation of the Lents' defense, the Commission allowed public comment, in which several individuals provided additional commentary. AR 4217-51. Multiple speakers within that period offered unsworn testimony—"evidence" which was repeatedly cited by Commissioners during their deliberations—that included unabashed speculation about the value of the property and the potential income from its use as a short-term rental. *See* AR 4235-40. Worse still, the executive director of the Authority,

Joseph Edmiston, appeared dressed "in my official attire" to present inflammatory testimony that contained many demonstrably false statements.[7] AR 4218-20. The Lents had no ability to respond to Mr. Edmiston or to any other public commenter, or to correct the multiple inaccuracies introduced into the record, many of which were later referenced by Commissioners during their deliberations. *See, e.g.*, AR 4276 (Chair Bochco castigating the Lents for "hav[ing] been playing games" by not "let[ting] people walk down your stairs," yet the Lents' beach access is through a private agreement with their neighbors to use the latters' undisputedly private stairway, AR 4191).

Commission staff were then given the opportunity to respond to the Lents' presentation. AR 4248-51. Following a

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[7] For example, Mr. Edmiston stated that the Authority was "prepared immediately to open this access way up using this facility right now." AR 4220. That bald assertion sharply conflicts with the Authority's letter to the Commission prior to the hearing, in which the Authority and Conservancy alleged that the Structures had precluded all but the most basic planning to develop the easement. AR 2516-17. His testimony also directly conflicts with the subsequent hearing testimony of the Conservancy's executive director, who stated that, before the easement could be opened, the "public works plan[,] . . . final engineering and design" would have to be completed. AR 4225.

recess, the Commissioners deliberated, during which they at one point entertained an $8.4 million penalty. They also discussed the possibilities of using a supersized penalty to fully fund the construction of the public access way on the property, among other "creative ideas" for the money. AR 4261-62. The Commissioners ultimately voted to issue a cease-and-desist order, requiring immediate removal of the Structures, and a penalty order of $4,185,000, more than 400% of the staff recommendation. AR 4130, 4307-09, 3109-16.

D. The Lents Challenge the Orders, and the Trial Court Rules Partially in Their Favor

Shortly after the hearing, the Lents filed this lawsuit, challenging both orders, along with the constitutionality of the penalty statute. Following briefing and a hearing, the trial court ruled partially in favor of the Lents. The court held that the Commission had provided insufficient notice to the Lents that they might be subject to a fine of over $4 million, and had failed to provide "an opportunity to present all available evidence and argue against" such a large penalty. Appellants' App. Vol. II, at 322. The court therefore issued a writ ordering the Commission to give the Lents notice of a specific proposed fine, as well as an

opportunity to "present additional evidence and argue against it or a lower fine." *Id*. at 323. However, the court upheld the cease-and-desist order and the statute, and declined to find that $4,185,000 was an unconstitutionally excessive penalty. *Id*. at 315-19, 323 n.13.

E. Statement of Appealability

The trial court entered judgment on July 10, 2018, and notice of entry of the same was served that same day. *Id*. at 326-28. On August 16, 2018, the Lents filed a timely notice of appeal. *Id*. at 333. On September 6, 2018, the Commission filed a timely notice of cross-appeal.

II.

STANDARD OF REVIEW

The Lents' appeal presents a number of issues with varying standards of review. Each of those issues and its respective standard of review is discussed in turn below.

A. The Challenge to the Cease-and-Desist Order

The Lents challenge the cease-and-desist order primarily on three grounds. First, the Lents contend that the alleged predicate for the cease-and-desist order—namely, that (1) the Structures are inconsistent with the house's coastal development

permit, and (2) the Structures themselves are illegal—is unsubstantiated. Like the trial court, this Court reviews the Commission's findings for "substantial evidence in the light of the whole record." Code Civ. Proc. § 1094.5(c). Importantly, the Court "cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record." *Bowman v. Cal. Coastal Comm'n*, 230 Cal. App. 4th 1146, 1150 (2014) (internal citations and quotation marks omitted). Instead, the Court "must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." *Id.* (internal citations and quotation marks omitted) "Substantial evidence" is evidence of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." *County of San Diego v. Assessment Appeals Bd. No. 2*, 148 Cal. App. 3d 548, 555 (1983) (internal citations and quotation marks omitted).

Second, the Lents argue that, under the doctrine of laches, it is too late for the Commission to pursue an enforcement action against them for the Structures, which were built in the early 1980s. "Laches is an equitable defense based on the principle that

those who neglect their rights may be barred from obtaining relief in equity." *Feduniak v. Cal. Coastal Comm'n*, 148 Cal. App. 4th 1346, 1381 (2007) (internal citations and quotation marks omitted). "[L]aches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay." *Id.* "Laches is a question of fact for the trial court, but may be decided as a matter of law where, as here, the relevant facts are undisputed." *Id.*

Third, the Lents argue that, properly interpreted, section 30810 of the Public Resources Code (governing cease-and-desist orders) cannot justify such an order against them, because they undertook no illegal activity requiring a permit. Questions of statutory interpretation, including whether a statute authorizes particular agency action, are reviewed by the Court independently and *de novo*, with no deference to the agency. *Yamaha Corp. of Am. v. State Bd. of Equalization*, 73 Cal. App. 4th 338, 349 (1999) ("The interpretation of statutes and regulations is a question of law."). *Accord Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1343-44 (2006) (same, and also holding that "[a] court does not . . . defer to an agency's

view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature" because "[t]he court, not the agency, has final responsibility for the interpretation of the law under which the regulation was issued") (internal citation and quotation marks omitted).

B. The Challenge to the Penalty Statute and Order

The Lents challenge the constitutionality of section 30821 both on its face and as applied. "The determination of the constitutionality of a statute and a regulation is a question of law," triggering the "de novo standard of review." *Sanchez v. State*, 179 Cal. App. 4th 467, 486 (2009). A statute is facially unconstitutional when it "inevitably pose[s] a present total and fatal conflict with applicable constitutional provisions." *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1102 (1995) (internal citations and quotation marks omitted). Alternatively, a statute is facially unconstitutional when, in the generality or vast majority of applications, it would violate an individual's liberties. *Today's Fresh Start, Inc. v. L.A. County Office of Educ.*, 57 Cal. 4th 197, 218 (2013). With respect to an as-applied challenge, to the extent that a dispute exists on the material facts concerning the

statute's application, that dispute is reviewed for substantial evidence in the record. Code Civ. Proc. § 1094.5(c).

III.

ARGUMENT

A. The Cease-and-Desist Order Should Be Set Aside

1. No substantial evidence supports the Commission's finding that the structures are unpermitted or otherwise improper

The cease-and-desist order is premised on the Commission's determination that the Structures are unpermitted, a finding based principally on the absence of the Structures' depiction from certain Commission documents. AR 3053-57. But that finding lacks substantial record evidence when viewed in light of the affirmative evidence adduced by the Lents.[8] For example, conceptual plans submitted to the Commission at the time that the Lents' predecessors applied for a coastal development permit for the house depict a second-story door for egress to the easterly side of the house (where the stairway was).

[8] Notably, the record does not contain any evidence affirmatively showing that the Structures were unpermitted—for example, a denial of a permit to install the stairway or gate. Rather, the Commission's entire case is based upon the supposed absence of evidence that the Structures were permitted, and inferences drawn from that supposed absence. *See* AR 3051-60.

AR 2659. As architects with substantial experience processing coastal development permits with the Commission in the late 1970s and early 1980s declared, under penalty of perjury, "walkways, steps, planters and other landscape/ancillary features outside of the footprint of the residence"—like stairways, landings, and gates—"were not always depicted on the initial concept drawings." AR 2561; AR 2562 (same).

Additionally, both the second-story door and the stairway are depicted in the set of plan drawings that were approved by Los Angeles County in 1980; these were to be filed with the Commission prior to commencement of construction, as specifically mandated by the coastal development permit for the house. AR 829-34. As the same architects declared, "a complete set of plans had to be submitted to the Commission in order [to] finalize a permit and proceed with construction," so the Commission can reasonably be presumed to have seen them. AR 2561; AR 2562 (same). In fact, after surveying the easement, the Conservancy's own consultant conceded that the secondary-story egress is "required by City of Malibu." AR 2667. As for the gate to the easterly side yard, appurtenances lying outside of a residence's footprint generally were not depicted in conceptual

plans submitted to the Commission in the late 1970s and early 1980s, so the gate's absence from such plans proves nothing. AR 2561-62. Quite the other way, it strains credulity to contend—as the Commission does—that a house fronting a busy highway (PCH) would be permitted without a basic protective enclosure like a gate, especially where, unenclosed, the yard would expose passersby to a six-to-seven-foot drop onto a landing covering a storm-water pipe. *See* AR 2331-32 (Lent Decl. ¶ 7).

This substantial evidence of the Structures' authorization exists *despite* the passage of time. The Commission first questioned the legality of the "fence and gate, vegetation, planters, a mailbox and a deck area" in 2007, and it first questioned the legality of the stairway in 2010—a quarter-century after the Lents' predecessors had installed them. *Id.* 703, 926, 2369. Thus, the Commission waited *over a generation* before targeting the Structures for removal and forcing the Lents (as good-faith purchasers of the property) to cobble together a defense based on decades-old permit files and the faded memories of whatever witnesses they could find. Even with such significant obstacles (including that the original coastal development permit applicant and his architect are dead, *id.* 4197), the Lents were

able to procure approved plans from the Commission's and the County of Los Angeles's files evidencing the existence of the stairway and the secondary egress it would provide at the time the coastal development permit was approved. *Id.* 2633-37, 2656-59, 2661.

Finally, the Commission's position that the legality of the Structures would be inconsistent with the home's coastal development permit, as well as the Coastal Act and its implementing regulations, AR 3057-58, gets it backward. As the foregoing evidence demonstrates, the Structures *were* consistent with the home's permit, understood in light of the contemporary permitting practice. Moreover, the Structures' presence does not conflict with the public easement or with the Coastal Act policies that led to the easement's unconstitutional exaction from the Lents' predecessors-in-interest. After all, the easement is non-exclusive, *see* AR 3101 (Comm'n staff report), the Commission itself recognized the need for a protective gate pending development of the easement, *see* AR 3788 (declaration of Commission deputy chief of enforcement acknowledging the advisability of a permitted protective gate pending Conservancy development of the easement), and the stairway did not actually

impede the passage of persons, *see* AR 4215 (stairway occupied only 27 inches of the 60-inch-wide easement).

Given the substantial evidence of the Structures' legality, and the absence of any affirmative evidence or reasonable inference of their illegality, the record contains no basis for the required predicate—violation of the Coastal Act—to the issuance of a cease-and-desist order.[9]

2. Laches bars the cease-and-desist order

Independent of the sufficiency of the evidence, the doctrine of laches bars the Commission's attack on the Structures. "'The defense of laches requires unreasonable delay plus *either* acquiescence in the act about which the plaintiff complains *or* prejudice to the defendant resulting from the delay.'" *Johnson v. City of Loma Linda*, 24 Cal. 4th 61, 68 (2000) (emphasis added) (internal citations and quotation marks omitted). "Laches . . . exists to assure defendants are not confronted with stale claims." *Transwestern Pipeline Co. v. Monsanto Co.*, 46 Cal. App. 4th 502,

[9] If the Court determines that there is inadequate evidence to sustain the cease-and-desist order, then the penalty order also must fall, as the legal predicate for its issuance—violation of the Act's public access provisions, Pub. Res. Code § 30821(a)—overlaps with that of the cease-and-desist order. AR 3038-42.

520 (1996). To that end, prejudice will be found when unreasonable delay results in the loss of significant evidence concerning the facts at issue, whether the evidence be documentary or the testimony of a material witness. *Gerhard v. Stephens*, 68 Cal. 2d 864, 904 n.44 (1968) ("The loss of witnesses is a factor demonstrating prejudice . . . ."); *City & Cty. of San Francisco v. Pacello*, 85 Cal. App. 3d 637, 645 (1978) (same). Laches can be applied to a public entity if it will not "nullify an important policy adopted for the benefit of the public." *Feduniak*, 148 Cal. App. 4th at 1381. *See City of Long Beach v. Mansell*, 3 Cal. 3d 462, 493 (1970) (applying equitable estoppel against public officials despite state's loss of title to public lands).

Here, the Commission was guilty of unreasonable delay in seeking the Structures' removal, thereby unduly prejudicing the Lents and acquiescing as a matter of law in their maintenance. The Structures were up by 1983. AR 3027. But the Commission failed to assert their alleged illegality until 2007, with respect to the gate and landing, and 2010, with respect to the stairway. *Id.* 926, 2369. The Commission failed to do so despite the fact that (1) the Structures are visible from PCH, (2) during that entire period, the Commission's "sister" agency (the Conservancy)

owned the easement purportedly burdened by the Structures and ought to have known about their existence from the start,[10] and (3) the Conservancy and the Commission had actual knowledge of the Structures no later than 1993 and 1996, respectively. AR 448-63, 699, 4077-4078, 4191-93, 4222.

As noted in the preceding section, the Commission's enforcement delay has resulted in the loss of significant evidence concerning the Structures' legality. When it became clear that the Commission was intent on eliminating secondary egress and exposing the Lents to liability for injuries through the compelled removal of the structures, the Lents attempted to contact the original applicant and his architect, only to learn that these two key witnesses had died. AR 2333 (Lent Decl. ¶ 16). The prejudice from such an evidentiary loss, compounded by the difficulty of reconstructing permitting events from decades-old files, is precisely what the doctrine of laches is intended to remedy.

Applying laches here would not nullify an important public policy. There is no substantial evidence in the record establishing that the Structures would interfere with development of a public

[10] As noted above, the Authority took over ownership and management of the easement from the Conservancy in 2018.

access way at the property. *See, e.g.*, AR 2475 (Lents willing to move stairway from easement area to another location); AR 4215 (stairway covered less than half of the easement); AR 4216-17 (Lents converted the fence to a gate, gave the keys to the Commission and Conservancy, and promised to remove the gate once the easement was made usable). Again, the Structures lie in a *non-exclusive* easement—a fact no one disputes—and the Lents therefore have every right to make use of their side yard in a way that does not unreasonably interfere with that non-exclusive easement. Laches bars the Commission's cease-and-desist order.[11]

3. The cease-and-desist statute does not apply to the Lents

Under section 30810 of the Public Resources Code, the Commission may issue a cease-and-desist order only against someone who "has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the [C]ommission without securing a permit or (2) is inconsistent with any permit previously issued by the [C]ommission." Pub. Res. Code

[11] For the reasons stated in this section, laches also bars the Commission's penalty order, which is founded upon the same alleged violations as the cease-and-desist order. AR 3038-42.

§ 30810(a). Section 30810 does not apply to the Lents, who have not undertaken or threatened to undertake *any* of the activities described in the cease-and-desist order that the Commission issued against them. They are innocent purchasers of property that contained allegedly unpermitted Structures, but those Structures were not built by them; they were built by their predecessors-in-interest two decades before they bought the house. As a consequence, under the plain meaning of section 30810, the cease-and-desist order is ultra vires. *See People v. Blackburn*, 61 Cal. 4th 1113, 1123 (2015) (to interpret a statute, courts "begin with the text" and, "[i]f no ambiguity appears in the statutory language, [courts] presume that the Legislature meant what it said, and the plain meaning of the statute controls") (internal citations and quotation marks omitted).

Nothing in *Leslie Salt Co. v. San Francisco Bay Cons. & Dev. Comm'n*, 153 Cal. App. 3d 605 (1984), relied upon below by the Commission and the trial court to affirm section 30810's application to the Lents, demands a contrary result. That decision involved a different statute (the McAteer-Petris Act) governing a different agency (San Francisco Bay Conservation and Development Commission) and presented a unique public-

policy concern. The McAteer-Petris Act authorizes the Bay Commission to issue a cease-and-desist order against anyone who has "undertaken, or is threatening to undertake, any activity" requiring a permit, such as the filling of an area within the Bay Commission's jurisdiction, Gov't Code § 66638(a). Leslie Salt owned land within the Bay Commission's jurisdiction. Between 1971 and 1976, and unbeknownst to Leslie Salt, unknown third parties illegally placed several hundred tons of earth, gravel, asphalt, broken concrete and other demolition materials, along with a barge-like structure, on its property. *Leslie Salt Co.*, 153 Cal. App. 3d at 610. There was no evidence that Leslie Salt knew anything about the illegal filling until after the Bay Commission had investigated and issued a cease-and-desist order. *Id.*

Leslie Salt brought a writ action against the Bay Commission, challenging the cease-and-desist order on the ground that the company had not undertaken, or threatened to undertake, any unpermitted development. *Id.* at 610-11. The court of appeal ruled against Leslie Salt. It recognized that, by its plain terms, the cease-and-desist statute reached only those responsible for undertaking illegal filling. *See id*. at 612-13. But the McAteer-Petris Act has no mechanism to address

unpermitted fill undertaken by a third party unbeknownst to the landowner, so the court of appeal deemed it necessary to stretch the application of the Act's cease-and-desist provision to include just such a landowner. *Id.* at 617-18. In the court's view, the Bay Commission's "ability to effectively regulate filling of the Bay requires that its cease and desist power extend to landowners regardless whether they actually placed the fill or know its origin." *Id.* at 617. In other words, the court considered it necessary to adopt a broad construction of the McAteer-Petris Act in order "to effectuate the important purpose" of that Act—namely, remedying unauthorized fill. *Id.* at 617-18.

Unlike the McAteer-Petris Act, the Coastal Act provides a specific remedy for addressing allegedly unpermitted activity by someone other than the landowner. Section 30811 of the Public Resources Code authorizes the Commission to "order restoration of a site" containing unpermitted or illegal development, regardless of whether the owner undertook the development. Pub. Res. Code § 30811. Hence, the rationale for adopting a "broad" construction of the McAteer-Petris Act in *Leslie Salt Co.* simply does not carry over to the Coastal Act. Accordingly, even if the Structures were unpermitted, section 30810 would still not

authorize issuance of the cease-and-desist order because the Lents undertook none of the alleged violations.

B. The Penalty Statute and Penalty Order Are Unconstitutional

For years, the Lents pursued good-faith efforts to resolve their differences with Commission staff, including agreeing to remove the gate and disputed stairway. AR 2475, 4215-17. However, staff continued to demand that the Lents agree to substantial penalties—a minimum of $600,000—as a condition to any settlement. AR 925–28. The Lents were understandably unwilling to submit to such an excessive fine, especially as they continued to believe that they had legitimate defenses as to both the application of the statute and the nature of the supposed violation. AR 2333 (Lent Decl. ¶¶ 13, 15). Thus, the Lents were left with no choice but to await an administrative hearing on both the cease-and-desist order and penalty order under section 30821. That proceeding resulted in both a cease-and-desist order and a $4.185 million penalty. The latter was based largely on the delay in the removal of the gate and stairway, a delay attributable to the Lents' good-faith arguments as to the Structures' legality, as well as the Commission's wish to send a

chilling message to other homeowners in Malibu. *See, e.g.*, AR 4257-58 (Commissioner Turnbull Sanders arguing for a larger penalty because of the "staff time and resources from at least three public agencies to work with the respondent to try and gain access"); AR 4267 (Commissioner Shallenberger advocating for a high penalty to be "very clear to not only the Lents, but all the other people who are currently in violation for not having opened up access ways that there are serious penalties").

The proceeding at which the Commission imposed this immense penalty did not—and could not—comport with due process. Section 30821 requires a bare minimum of informal protections for accused violators in a quasi-criminal proceeding that can—and with the Lents did—result in a devastating fine. To make matters constitutionally worse, the provision entrusts the adjudication of the penalty process to an agency that has a biased interest in the outcome. The statute's lack of procedural safeguards, coupled with its irresistible incentives to biased adjudication—the harm from both being amply displayed in the administrative hearing—render the statute unconstitutional on its face and as applied.

1. Section 30821 does not provide the minimum constitutionally required protections for a quasi-criminal proceeding

No person may be deprived of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Cal. Const. art. I, §§ 7, 15 (same). When an administrative agency acts in an adjudicative capacity, due process requires a fair tribunal. *Morongo Band of Mission Indians v. State Water Res. Control Bd.*, 45 Cal. 4th 731, 737 (2009). Procedural due process rules are meant to protect persons "from the mistaken or unjustified deprivation of life, liberty, or property" by providing them with sufficient means to "contest the basis upon which a State proposes to deprive them of protected interests." *Carey v. Piphus*, 435 U.S. 247, 259-60 (1978). A "balancing of the interests at stake" is required, which balancing may "counsel formal hearing procedures that include the rights of confrontation and cross-examination." *Mohilef v. Janovici*, 51 Cal. App. 4th 267, 286 (1996).

The factors to be considered in the balancing of interests include: "(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"; "(3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official"; and "(4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 287 (citations omitted). *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (same, minus third factor).

Section 30821 is unconstitutional under these factors. The private interest affected by section 30821 is substantial: the statute authorizes penalties of up to $11,250 per day for a period of up to five years—creating potential fines of over $20 million levied against individual landowners. Such substantial penalties are so financially devastating[12] that they are akin to the deprivation of one's means of livelihood, a consideration which

[12] Indeed, a $20 million penalty represents more than ten times what an average American with a bachelor's degree can expect to earn over the course of his or her *entire lifetime*—and 20 times that of a high school graduate. Michael F. Thompson, *Earnings of a Lifetime: Comparing Women and Men with College and Graduate Degrees*, InContext, Mar-Apr 2009, http://www.incontext.indiana.edu/2009/mar-apr/article1.asp.

merits substantial weight in the due process analysis. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("We have frequently recognized the severity of depriving a person of the means of livelihood."). In fact, the $4.185 million penalty applied to the Lents represents, according to Commission staff, nearly two-thirds of the total value of the Lents' property, AR 4278, and the judgment lien imposed, Pub. Res. Code § 30821(e), can be used to divest them completely of that property.

As for the next factor, the procedures used in section 30821 are insufficient to prevent the risk of erroneous deprivation, whereas the value of additional procedural safeguards would be substantial. Section 30821 requires the use of informal procedures applicable to *civil* enforcement matters—such as the issuance of non-self-executing orders and notices of violation. *See* Pub. Res. Code § 30821(b) (citing Pub. Res. Code §§ 30810-30812); Cal. Code Regs. tit. 14, §§ 13180-13188 (Commission regulations governing cease-and-desist order proceedings.). But section 30821 creates a *quasi-criminal* proceeding that threatens the seizure of property through significant penalties. When determining if a penalty or fine is quasi-criminal, the inquiry is

not whether the action being penalized is criminal, but whether the fine is intended as "punishment." *Austin v. United States*, 509 U.S. 602, 610 (1993). A finding that the Legislature "intended a particular sanction to constitute punishment 'ends the inquiry.'" *People v. Ruiz*, 4 Cal. 5th 1100, 1122 (2018) (quoting *People v. Mosley*, 60 Cal. 4th 1044, 1063 (2015)). The administrative penalty provision easily meets this test, as it is intended to punish violations of the public access provisions of the Coastal Act. *See* Pub. Res. Code §§ 30821(c), 30820(b)(5) (requiring consideration of non-remedial factors including the violator's culpability). *See also* Appellants' App. Vol. II, at 320 (trial court ruling).

In contrast to formalities usually afforded the accused in the quasi-criminal context, the Lents had no right at their hearing to (1) cross-examine adverse witnesses, such as current and former Commission employees who submitted written declarations against the Lents, *see, e.g.*, AR 3781-88, (2) fully respond to all adverse testimony, including public comment and testimony from the Commission's staff received after the Lents had presented their defense, Cal. Code Regs. tit. 14, § 13185(d)-(e) (allowing other speakers to testify after the alleged violator

has presented its position), *see* AR 4217-53, or (3) exclude from consideration, under standard evidentiary rules, hearsay, speculation, and other normally inadmissible testimony, Cal. Code Regs. tit. 14, §§ 13186, 13065 (authorizing admission of evidence despite "any common law or statutory rule which might make improper the admission of such evidence").[13] Nor could the Lents even have known in advance which parties would choose to speak, or what information they were going to present, as public witnesses need only indicate their intent to testify shortly before the commencement of the public hearing. *See* Cal. Coastal Comm'n, Meetings: Rules & Procedures[14] ("If you wish to speak, please fill out a 'Request to Speak' form and give it to a staff person prior to the matter being heard."). Thus, application of robust rules of procedure and evidence to a quasi-criminal proceeding of the kind authorized by section 30821 is needed to adequately protect property from arbitrary deprivation.

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[13] *See, e.g.*, AR 4278 (well after the Lents' presentation, Chair Bochco asserting, apparently based on her own unverified knowledge, that "I don't think the doctor is hurting . . . . And you can sell a house with an easement on it. That's not a problem in Malibu, they all know about this.").

[14] *Available at* https://www.coastal.ca.gov/meetings/rules-procedures/ (last visited Feb. 6, 2019).

Such rules would in turn protect the due process "dignitary interest" of the accused, like the Lents. *See People v. Ramirez*, 25 Cal. 3d 260, 267-68 (1979) (due process requires a procedure that ensures that "the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability," recognizing that "human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion") (citation omitted). *See also Naidu v. Superior Court*, 20 Cal. App. 5th 300, 312 (2018) (the dignitary interests protected by due process guarantee individuals a "meaningful" opportunity to "present their side of the story") (quoting *Ramirez*, 25 Cal. 3d at 269). Indeed, additional protections would help to dispel the appearance of unfairness that section 30821's lax rules of procedure foment. *See People v. Sanchez*, 18 Cal. App. 5th 727, 756 (2017) (the dignitary interest protected by due process "encompasses the appearance of fairness to those involved").

Implementing these additional safeguards to respect the human dignity of the Lents and other accused property owners would not unduly burden the Commission; to the contrary, more stringent procedures and evidentiary requirements could save

enormous time and resources currently expended having to allow deficient evidence and testimony to be presented. For example, had the Lents been given a full opportunity to respond, they could have disabused the Commission of its misapprehension that the existing public easement allowed access directly to the beach. *See* AR 4276 (statement of Chair Bochco) ("I mean, you're either going to let people walk down your stairs or you're not."). *Cf.* AR 4191 (the Lents' beach access is through a private easement over their neighbors' private stairway). Moreover, any additional costs to the Commission should be minimal, given that most administrative penalty matters are resolved without a hearing. RJN, Elling Decl., Exh. A, at 10-11.

Below, the Commission contended that the power that section 30821 bestows on the Commission has routinely been granted to other administrative agencies. But the practice is precisely the other way. An individual who may be penalized by a California administrative agency typically is afforded substantially greater procedural protections that what section 30821 offers, such as the right to submit testimony under oath, to cross-examine witnesses, and in some instances the right to use the subpoena power and to demand a hearing before a neutral,

third-party administrative law judge. *See TWC Storage, LLC v. State Water Res. Control Bd.*, 185 Cal. App. 4th 291 (2010), *as modified* (June 29, 2010) (Water Board adjudicative proceedings governed by Cal. Code Regs. tit. 23, §§ 648-648.8, which incorporate rules of evidence and civil procedure); *Starving Students, Inc. v. Dep't of Indus. Relations*, 125 Cal. App. 4th 1357 (2005) (Division of Labor Standards Enforcement governed by Cal. Code Regs. tit. 8, §§ 15585-15590, which entitle parties to the right to "be heard, to present evidence and to cross examine witnesses" as well as the right to request that the Division issue subpoenas); *McHugh v. Santa Monica Rent Control Bd.*, 49 Cal. 3d 348, 378 n.45 (1989) (listing examples of administrative penalty provisions, including Hazardous Waste Control enforcement, which is governed by Health & Safety Code § 25187(e), and which incorporates the formal hearing provisions of the California Administrative Procedure Act). A rare exception is the fine power granted to a county agricultural commissioner, noted in *McHugh*, but the penalty that such a commissioner may impose cannot exceed $5,000 per violation. Food & Agric. Code § 12999.5(a). Such a substantially lower amount than what section 30821 authorizes may well justify the provision of less

formal procedures under the pertinent due process factors. *Cf.* Fish & Game Code §§ 2301(f), 2302(f) (authorizing the Department of Fish and Wildlife to issue administrative penalties not to exceed $1,000).

Federal practice under statutes that, like the Coastal Act, regulate activities affecting the physical environment supports the conclusion that section 30821's procedures are inadequate given the substantial fines that the provision authorizes. *Cf. Hale v. Morgan*, 22 Cal. 3d 388, 399 (1978) (analyzing federal statutory examples as an aid to determine whether a California law addressing similar activity violated due process). For example, the administrative penalty order provisions of the federal Clean Water Act allow for the imposition of substantial "Class II" penalties—those greater than $53,000, 83 Fed. Reg. 1190, 1193 (Jan. 10, 2018)—only through the use of the federal Administrative Procedure Act's formal administrative adjudication procedure. *See* 33 U.S.C. § 1319(g)(2). That process guarantees an accused far more protection than what section 30821 promises, including the right to present and request evidence under oath to a neutral administrative law judge, to supplement with rebuttal evidence, and to cross-examine

witnesses. *See* 5 U.S.C. § 556(c)-(d). Similar protections are afforded potential penalty order recipients under the Clean Air Act, 42 U.S.C. § 7413(d)(2), the Endangered Species Act, 16 U.S.C. § 1540(a)(2), the Magnuson Fisheries Act, 16 U.S.C. § 1855(a), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9609(b)(5).

As the foregoing makes clear, employment of the informal proceedings imported by section 30821 to levy massive, punitive fines is unprecedented among California agencies, and contrary to federal practice. It creates the risk of "mistaken or unjustified deprivation[s] of life, liberty, or property." *Carey*, 435 U.S. at 259. The quasi-criminal nature of the penalty, coupled with its authorization for multi-million-dollar penalties—resulting here in a $4.185 million penalty—requires at a minimum the rules of procedure and evidence typically found in more "formal hearing procedures [including] the rights of confrontation and cross-examination." *Mohilef*, 51 Cal. App. 4th at 286 (citation omitted). Because section 30821 establishes a quasi-criminal penalty proceeding but provides none of those procedures, it violates due process.

Even if due process would not be violated in every or in the great majority of cases in which section 30821 is employed, its application to the Lents would still be unconstitutional. Neither the Commission nor the trial court cited any decision, nor are the Lents aware of any decision, that has upheld a multi-million-dollar penalty levied by an administrative agency following an informal administrative hearing in which *none* of the traditional checks against arbitrary and unfair adjudication—the right to testimony under oath, the right to subpoena, the right to cross-examine witnesses, the right to present rebuttal evidence, the right to a neutral, third-party adjudicator—was afforded. Thus, even if section 30821 is not constitutionally infirm on its face, its slim procedures cannot satisfy the Lents' due process rights.[15]

[15] Although the trial court held that section 30821's procedures are unconstitutional as applied to the Lents, it ruled that the constitutional defect could be cured simply by giving the Lents notice of a specific fine to be imposed and an opportunity to present additional evidence. Appellants' App. Vol. II, at 323. For the reasons stated in the text, the Lents as-applied due process rights can only be satisfied by provision of substantially more protections than what the trial court's writ envisions, particularly if on remand the Commission and its staff were to persist in seeking a six-or-seven-figure penalty against the Lents.

2. When determining whether to issue a penalty order under section 30821, the Commission is an unconstitutionally biased adjudicator

Due process guarantees an impartial and disinterested tribunal. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This requirement is necessary to ensure both the appearance and reality of fairness. *Id.* Thus, the state and federal due process clauses are violated when "a particular combination of circumstances creat[es] an unacceptable risk of bias." *Morongo*, 45 Cal. 4th at 741.

Section 30821 unconstitutionally vests adjudicatory power within a biased institution, fundamentally compromising the accused's ability to receive a fair hearing. Potential violations of section 30821 are identified by Commission staff working in an enforcement capacity. *See, e.g.*, AR 3380-87 (notice of intent to issue penalty order). Where such violations are first determined by parties acting in a prosecutorial role, due process requires that a *de novo* review of all factual and legal issues be made by a neutral adjudicator. *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Trust for S. California*, 508 U.S. 602, 618 (1993). But section 30821 provides no such neutral adjudicator, instead granting adjudicatory authority to the same

group of individuals that is statutorily commanded by the Coastal Act to "[m]aximize public access to and along the coast." Pub. Res. Code §§ 30001.5(c), 30210, 30821. Nor are there any further avenues of administrative review after a ruling by the Commission—the only avenue afforded the Lents is judicial review after the imposition of the penalty under section 1094.5 of the Code of Civil Procedure. But review of the facts under that section is limited to the indulgent substantial-evidence standard. Civ. Proc. Code § 1094.5(c).

Due process prohibits adjudication by any institution that has "'so strong a motive' to rule in a way that would aid the institution," even where no individual adjudicator will personally gain from the outcome. *Alpha Epsilon Phi Tau Chapter Hous. Ass'n v. City of Berkeley*, 114 F.3d 840, 844 (9th Cir. 1997). For adjudications imposing penalties under section 30821, the Commission is such an inherently biased tribunal: as noted, one of its top policy priorities is to maximize public access to the beach, Pub. Res. Code §§ 30001.5(c), 30210, the very policy the violation of which serves as the legal predicate for a penalty order, *id*. § 30821(a). Filling the "Violation Remediation Account of the Coastal Conservancy Fund"—into which all section 30821

proceeds go, *id.* § 30821(j)—directly helps the Commission to advance that policy. *Id.* § 30823 (funds derived from the Coastal Act "shall be expended for carrying out the provisions" of the Act). Notably, this biased practice is in stark contrast to other adjudications made by the Commission, because no other proceeding before the Commission routinely allows the agency both to adjudicate and to fine and thereby raise revenue for its own purposes. The Commission's institutional bias, which section 30821 weaponizes, renders that provision intolerable. *See Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (due process violated when an adjudicator's executive responsibilities for government financing create an incentive to maximize penalty revenue from adjudications).

The constitutionally deficient procedures of section 30821 stand in sharp contrast to other, more reasonable, enforcement mechanisms already available to the Commission. For example, under section 30820—which also authorizes the imposition of hefty civil penalties—the Commission must go to court and persuade a disinterested decision-maker to impose civil fines. Pub. Res. Code § 30820. Moreover, it must do so according to the normal rules of civil procedure and on an open record, without

the built-in deference and other litigation advantages that section 30821 guarantees. *See id*. This procedure is constitutionally permissible because the judiciary has no pecuniary interest, personal or institutional, in the fines paid. For example, court-imposed fines under section 30820 cannot finance the construction of court houses or other projects that promote judicial priorities. Section 30821, however, bestows the power to financially destroy individuals in the hands of those who institutionally benefit from the most aggressive exercise of that power. *Cf. Today's Fresh Start*, 57 Cal. 4th at 216 ("Conclusive proof of actual bias is not required; an objective, intolerably high risk of actual bias will suffice."). The high risk of bias inherent in section 30821 results in a procedure that is fundamentally unfair both in appearance and in reality. *See id*. at 217 (due process violated when adjudicator is subject to an "impermissible 'possible temptation' to partisanship" based on its institutional interest in the use of revenue derived from adjudications) (quoting *Ward*, 409 U.S. at 60). Section 30821 on its face violates due process.

Even if unconstitutional bias were not the inevitable result of section 30821's procedure, the institutional bias that the administrative penalty power can incite was fully aflame at the Lents' hearing before the Commission. Commissioners were consumed by the prospect of exacting a multi-million dollar penalty, each apparently attempting to outdo his or her colleagues by proposing ever higher and more punitive amounts. AR 4266 (Commissioner Vargas proposing $2.5 million—more than twice the amount proposed by staff); AR 4286 (Commissioner Shallenberger proposing $6.5 million); AR 4269 (Commissioner Diaz proposing $8.4 million if the house were worth that). This one-upmanship was shrewdly abetted by the Commission's own counsel, who urgently reminded Commissioners that "I actually have a calculator" to "facilitate any commissioner discussion of amounts." AR 4268. The Commissioners and staff delighted in how they could put the money they raised to use, with the Commission's chief of enforcement reminding them (in reference to another penalty matter): "[I]f you had creative ideas of what to do with 200,000, certainly there would be more that's possible to do with whatever amount you impose today." AR 4261-62.

This unconstitutional bias created by section 30821, as applied to the Lents, was undoubtedly abetted by a 2012 memorandum of understanding between the Commission and the Conservancy. Appellants' RJN, Salzman Decl. Exh. C. According to that agreement, the Commission's executive director—who serves at the pleasure of the Commission, Pub. Res. Code § 30335—has final say on how most funds, including those derived from the Lents' penalty order, may be used. *Id*. Exh. C, Mem. of Understanding between the Cal. Coastal Comm'n and the Cal. Coastal Conservancy on the Use and Expenditure of Violation Remediation Account Funds (MOU) ¶ I.B (Apr. 2012) ("If funds are in excess of five thousand dollars . . . and not directed by the court settlement, judgment or otherwise legally binding document toward a specific purpose, the Executive Director may elect to direct the funding . . . ."). Thus, although the Conservancy may nominally control the Violation Remediation Account, for big bounties like the Lents' penalty, the Commission calls the shots.

In summary, although the proceeds from the Lents' penalty order will not fill the pockets of individual Commissioners, the money will directly support coastal access policies, Pub. Res.

Code §§ 30821(j), 30823, in a manner over which the Commission retains substantial control, MOU ¶ I.B. These public access policies are the very same which the Commission is obligated to maximize, *id*. §§ 30001.5(c), 30210, and which the Commission as adjudicator held the Lents to be violators of. Such a collection of conflicting interests is more than enough to "tempt [the Commission] to disregard neutrality." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 878 (2009). In fact, as applied to the Lents, it created a procedure whereby the Commission could not "hold the balance nice, clear, and true between the state and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), thereby violating the Lents' due process rights.

3. The $4.185 million penalty against the Lents is unconstitutionally excessive

Finally, as applied to the Lents, section 30821 is unconstitutionally high under the Excessive Fines and Due Process Clauses of the United States and California Constitutions,[16] U.S. Const. amend VIII; Cal. Const. art. I § 17;

[16] The United States Supreme Court will decide this Term whether the Eighth Amendment's Excessive Fines Clause is incorporated into the Fourteenth Amendment's Due Process Clause. *See Timbs v. Indiana*, No. 17-1091 (U.S., argued Nov. 28, 2018). In *Timbs*, Indiana secured the forfeiture of petitioner's

Hale, 22 Cal. 3d at 397 (due process forbids the imposition of "arbitrary, excessive and unreasonable penalties").

To begin with, the fine imposed against the Lents is a penalty subject to constitutional constraint. *Austin*, 509 U.S. at 610 (the Excessive Fines Clause applies to civil as well as criminal penalties). What matters is not whether a penalty is labelled as civil or criminal, but whether the penalty operates at least in part as punishment. *Id.* As noted above, *supra* Part III.B.1, a penalty imposed pursuant to Section 30821 handily satisfies this test, as it is intended at least in part to punish violations of the Coastal Act's public access provisions. *See* Pub. Res. Code §§ 30821(c), 30820(b)(5) (requiring consideration of non-remedial factors including the violator's culpability).

Whether a fine subject to constitutional review is excessive depends principally on proportionality. "The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Proportionality generally is assessed by taking into account: (1) the defendant's culpability;

Land Rover—worth about $40,000—because of its use in drug trafficking. *State v. Timbs*, 84 N.E. 3d 1179, 1181 (Ind. 2017).

(2) the relationship between the harm and the penalty; (3) the penalties imposed in similar statutes or circumstances; and (4) the defendant's ability to pay. *See People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707, 728 (2005) (citing *Bajakajian*, 524 U.S. at 337-38). The analysis is not, however, limited to a "rigid set of factors," and no factor should be applied mechanistically. *See United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1121 (9th Cir. 2004); *United States v. Ferro*, 681 F.3d 1105, 1115 (9th Cir. 2012). Ultimately, what matters is whether the punishment is "grossly disproportional" to the gravity of the offense. *Id.*

The Commission punished the Lents for violating "the public access provisions" of the Coastal Act, because they allowed to remain in place a gate, stairway, and other run-of-the-mill residential items within an undeveloped public access easement. *See* AR 3021 (Comm'n staff report). Although the Coastal Act does prohibit development that "interfere[s] with the public's right of access to the sea," Pub. Res. Code § 30211(a), the Lents have never interfered with any actual access because none has ever existed, *see* AR 700, 2396-98; and, in any event, the Lents gave the Conservancy and the Authority the keys to the gate,

AR 4216-17, so as to facilitate those agencies' development of public access. At best, the Commission could only assert that the Lents' efforts to protect their rights and to pursue amicable and mutually acceptable resolution of the dispute somehow delayed efforts by the Conservancy and the Authority to properly develop a true public access point at the location.[17] AR 3030 (Comm'n staff report) (noting that the Lents' contention that removal of the Structures "could violate their rights as private property owners, as well as other legal principles," has "substantially impair[ed] the ability of the Conservancy and [the Authority] to proceed with finalizing and implementing a public accessway"). But vigorous efforts to contest supposed violations and pursue settlement—or if settlement fails, to assert the right to a fair hearing—are not culpable behavior to be punished but rather constitutionally protected liberties to be safeguarded. *See Cal. Teachers Ass'n v. State*, 20 Cal. 4th 327, 357 (1999) (asserting

[17] And even the harm from any delay is uncertain. Not only do the Conservancy and Authority still to this day lack an actual plan to open up the access way, considerable evidence suggests that such an access way may never built, given the significant engineering challenges that the site poses. *See* AR 2396-98, 2404-05; Appellants' App. Vol. I, at 263-65 (Lents' engineering experts' analyses).

right to a hearing is constitutionally protected by the Due Process Clause and cannot be punished by requiring teachers to pay half the costs of hearings).

The Lents' minimal culpability is underscored by their good-faith belief that they were not violating any public access provisions,[18] AR 2331, 2333 (Lent Decl. ¶¶ 4, 5, 13, 15) (asserting under oath that the Lents purchased the property in good faith and, based on the advice of counsel, reasonably believed that the Structures were legal). That belief adds further support to the Lents' argument that their $4.185 million fine is excessive. *See R.J. Reynolds Tobacco Co.*, 37 Cal. 4th at 730 (affirming "the relevance of good faith to the determination whether a fine or penalty is excessive"). Another pertinent consideration counseling a much lower penalty is that most violations of the Coastal Act—and thus most predicates for section 30821 liability—are strict liability and do not require proof of *mens rea*. Philip J. Hess, *Citizen Enforcement Suits Under the California Coastal Act*, 24-

[18] The Commission made no finding that the Lents have acted in bad faith. Although the Commission determined that the Lents purportedly "have a high degree of culpability," that finding is solely based on the Lents' decision to vigorously contest the legal basis for the Commission staff's enforcement. *See* AR 3047 (Comm'n staff report).

DEC L.A. Law. 17, 17 n.14 (Dec. 2001). Here, the Commission did not need to establish that the Lents had any intention of violating the Coastal Act's public access provisions. *See* AR 4175 (Commission staff attorney explaining that section 30821 does not require an intentional or knowing violation). This relatively easy burden that the Commission needed to carry is another mark against the constitutionality of the $4.185 million penalty. *See People v. Estes*, 218 Cal. App. 4th Supp. 14, 22 (2013) (observing that "a legal basis and justification for finding [a] violation . . . to be a strict liability offense, obviating the prosecution to prove *mens rea*, is that the penalty for violation is minimal," and holding that a $47,000 fine for violating a Fish & Game Code provision was unconstitutionally excessive).

A further indication is that the penalty is not relative to any harm caused by the Lents. To begin with, the Lents were held liable for over $4 million for allegedly having delayed the opening up of one access point to one portion of a Southern California beach. *See* AR 3045-46 (Comm'n staff report). In other words, the alleged violation had nothing to do with public health or safety, which concerns in other circumstances may sustain a higher penalty. *See City & Cty. of San Francisco v. Sainez*,

77 Cal. App. 4th 1302, 1322, 1307 (2000) (upholding a $1,000 per day fine as constitutional, and noting the "highly serious matter" raised by the violations, which "substantially endangered the health and safety of the residents"). Rather, the extreme disproportion between the Commission's penalty order and the harm from the alleged violation is demonstrated by comparison to actual criminal penalties imposed for other environmental harms. *See, e.g.*, Penal Code § 374.7(b) (maximum penalty for dumping waste matter into a body of water $3,000); *id.* § 374.8(b) (maximum penalty for knowing deposit of hazardous substance on roadway or waters of the state $10,000); *id.* § 597(d) (maximum penalty for cruelty to animals $20,000); Fish & Game Code § 12008 (maximum penalty for unlawful take of endangered or protected species $5,000); *id.* § 12007 (maximum penalty for violation of streambed alteration agreement $5,000).

In fact, in more than quadrupling its staff-recommended amount, the Commission seemed mostly concerned not with the nature of the Lents' particular violation, but with penalizing their good-faith resistance to Commission staff enforcement, as well as with setting a brow-beating example to other property owners. For example, Commissioner Shallenberger argued for a

substantial increase in the staff's recommended fine to "reflect the time and energy and staff resources that have gone in[to]" prosecuting the Lents, while referencing the many letters sent by the Lents through counsel asserting that they were not in violation of the Act. AR 4266. Similarly, Commissioner Turnbull-Sanders deemed the Lents' letters and settlement discussions to be relevant under section 30821's "prior history of violations" factor for assessing a penalty amount. AR 4258 ("[L]ooking at the prior history of violations . . . staff went into great detail in looking at how many letters, how many points of contact, how many times there were meetings with the respondent that were to no avail."). Joining the chorus of denunciation, Chair Bochco declaimed that the "degree of culpability is obviously very high" because the Lents kept "sending more—more and more legal rhetoric about, 'Oh, gee, is this—you know, is this really the law?'" AR 4277. *Accord* AR 4263 (Comm'r Vargas) ("[W]e don't want to be in a position . . . rewarding . . . applicants that have been fighting us . . . ."); AR 4267 (Comm'r Shallenberger) ("I also want to . . . make it very clear to not only the Lents, but all the other people who are currently in violation for not having opened up access ways that there are serious penalties."). *See* AR 4168

(testimony of Commission lead enforcement staffer) (citing the "tremendous amount of time in substantive letter-writing, legal research, negotiations, . . . and meetings" in response to the Lents' defenses as a factor supporting a higher fine). But as noted above, the government may not punish an individual for zealously defending his or her liberties. *United States v. Goodwin*, 457 U.S. 368, 372 (1982) ("[W]hile an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right."). And a raw desire to deter cannot justify an otherwise unconstitutionally excessive fine. *Avalon Bay Foods v. Workers' Comp. Appeals Bd.*, 18 Cal. 4th 1165, 1181 (1998) ("If a fine or forfeiture imposed as punishment for crime may not be 'grossly disproportional to the gravity of the defendant's offense,' surely a civil penalty, even when imposed for deterrent effect, may not be so.") (internal citations removed).

To be sure, at least one substantially large fine under the Coastal Act has been upheld. *Ojavan Inv'rs, Inc. v. California Coastal Comm'n*, 54 Cal. App. 4th 373, 394-98 (1997) (holding that fines of over $9.5 million were not excessive under the

Excessive Fines or Due Process Clauses).[19] But that case involved 73 separate violations of the Coastal Act. *Id.* at 398. The Lents, on the other hand, were fined almost half that amount for one violation of the Coastal Act's public access provisions. AR 3043 (Comm'n staff report) ("[T]he Commission is imposing a penalty for only one violation, and it is therefore using a single violation as the basis for the determination of the penalty amount.").

The Lents' fine also is remarkably disproportionate to the only other contested penalty order that the Commission has issued to date. In that matter, the Commission fined beachfront homeowners $1 million for, without a permit, having torn down and completely rebuilt their home and seawall, the latter of which has accelerated coastal erosion, leading to the shrinking of a public beach. *See* RJN, Elling Decl., Exh. A, at 22; Exh. B, at 2-8. The Lents were penalized over four times that amount, even though they undertook no illegal development, destroyed no beach, and impeded no actual public access.[20]

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[19] The penalty was issued under section 30820, which requires the Commission to go to court to obtain a penalty, so it did not implicate the same due process concerns at issue here.

[20] The Lents' fine is also substantially larger than the six consented penalty orders issued to date by the Commission. *See* RJN, Elling Decl., Exh. A, at 20. The largest of these was for

In summary, the penalty applied to the Lents was grossly disproportionate, in violation of the Excessive Fines and Due Process Clauses of the state and federal Constitutions. The Lents' alleged wrongdoing—leaving in place a gate, stairway, and other innocuous accoutrements of the typical family home, because of a good-faith belief that they were perfectly legal—in no way can justify a $4.185 million penalty.[21]

CONCLUSION

For the foregoing reasons, the judgment of the superior court declining to set aside the cease-and-desist order, and affirming the constitutionality of section 30821 on its face and in

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$1.45 million, levied against a property owner for, in part, having undertaken "substantial unpermitted construction work on the site, including dumping large boulders (some weighing as much as 6-tons), across the beach." *Id*. at 21. Again, the Lents undisputedly undertook no development and impeded no actual access, and yet their fine is nearly 300% greater—another mark of the Commission's unconstitutional penal excess.

[21] Should this matter be remanded to the Commission, the Lents are prepared to present additional evidence as to their inability to pay a substantial fine. *Cf*. AR 4212 (home rental revenue insufficient to cover mortgage and property tax).

part as applied to Appellants Warren Lent, Henry Lent, and the Lent Family Living Trust, should be reversed.

DATED: February 12, 2019.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Appellants' Opening Brief is proportionately spaced, has a typeface of 13 points or more, and contains 12,221 words.

DATED: February 12, 2019.

DAMIEN M. SCHIFF

DECLARATION OF SERVICE

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On February 12, 2019, a true copy of Appellants' Opening Brief 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 efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 12th day of February, 2019, at Sacramento, California.

TAWNDA ELLING