



May 27, 2021

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

Re: Lent v. California Coastal Commission, No. S268762
Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The New Civil Liberties Alliance (“NCLA”) and the National Federation of Independent Businesses Small Business Legal Center (“NFIB Legal Center”) hereby submit this letter as *Amici Curiae*, (referred to collectively below as “*Amici*”) urging the Court to grant the Petition for Review filed by Plaintiffs, Appellants, Cross-Respondents Warren and Henny Lent (“the Lents” or “Petitioners”). While the Petitioners have raised three issues worthy of this Court’s consideration, *Amici* submit this letter to focus on the first issue, explaining why review is necessary to address the lack of due process afforded to the Lents by the California Coastal Commission (“CCC” or “Commission”) in determining the administrative fine to be imposed for their alleged violation of the California Coastal Act (“Coastal Act”).

This letter highlights important due process and agency adjudication considerations implicated by this matter. It draws on the experience and expertise of *Amici* in administrative adjudications both in California and nationally.

NCLA is a nonpartisan, nonprofit civil rights organization founded by Columbia University Law School Professor Philip Hamburger to defend constitutional freedoms from violations by the administrative state. NCLA views the administrative state as an especially serious threat to civil liberties. No other current legal development denies more rights to more Americans than the use of unlawful administrative power, with this case being a perfect example. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

The “civil liberties” of the organization’s name include rights at least as old as the United States Constitution itself, such as the due process of law and the right to be tried in front of an impartial and independent judge (not a partial and dependent adjudicator). Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, administrative agencies like the CCC, and even sometimes the courts have neglected them for so long. NCLA is dedicated to encouraging the legislative branch and our courts to reclaim their rightful roles in ensuring the protection of our civil liberties and rights to due process.

NFIB The National Federation of Independent Business Small Business Legal Center (“NFIB Legal Center”) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (“NFIB”) is the nation’s leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses.

Amici are particularly disturbed by the CCC’s unconstitutional regulatory enforcement and adjudication practices under the recently enacted Section 30821 of the Coastal Act. As this case is one of the first contested applications related to Pub. Res. Code §30821, the decision of this Court will have a strong impact on the due process rights of the Lents, as well as all future enforcement targets who will come within the purview of Section 30821. This Court’s intervention is needed to ensure that there are appropriate and constitutionally mandated guardrails on the CCC’s exercise of power under section 38021 so as to avoid the violation of Californians’ sacrosanct due process rights. This Court’s pronouncement on the constitutional constraints governing section 30821 enforcement actions will also provide the Courts with a framework for review of CCC decisions and make clear that any proceedings pursued pursuant to the Coastal Act will provide a fair adjudication of the issues, while protecting the due process rights of all involved.

I. The CCC’s Hearing Process and Decision to Levy a \$4.185 Million Administrative Civil Penalty Violated the Lents’ Due Process Rights

The Due Process Clauses of the California and United States Constitutions state that 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. Justice Cardozo observed that the essential element of due process is “the protection of the individual against arbitrary action.” *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 302 (1937); *cf. Today’s Fresh Start, Inc. v. Los Angeles County Office of Education*, 57 Cal. 4th 197, 212 (2013).

At a minimum, due process requires notice and a meaningful opportunity *to respond*. *See Today’s Fresh Start*, 57 Cal. 4th at 212. Due process is flexible, but a meaningful opportunity *to respond* also requires an impartial adjudicator. *Id.* This flexibility protects individuals from

arbitrary actions by permitting due process to “be tailored to the requirements of each particular situation.” *In re Marriage of Flaherty*, 31 Cal. 3d 637, 654 (1982).

It is critical for this Court to weigh in on the question of whether section 30821 and the CCC’s procedures can be reconciled with the concept of due process for an individual caught up in such a hearing. We do not believe that such reconciliation is possible. We are in fact dealing with a situation that is more akin to a wolf, coyote and lamb sitting down to decide what to have for dinner, with a dose of retribution thrown in to ensure that any other lambs who are later invited to a meal go quietly and without challenge. While landowners such as the Lents are given notice of the charges and proceeding, as well as a limited opportunity to present evidence, the “meat” of the hearing takes place thereafter, with the other participants allowed to present their own arguments while also challenging the accused’s (e.g., the Lents’) claims and evidence with impunity. The accused has no notice of who will testify, is not allowed to cross-examine such witnesses, cannot present rebuttal evidence to the allegations made, hearsay testimony is allowed, and witnesses are not placed under oath. *See* Cal. Coastal Comm’n, Virtual Hearing Procedures at 2-4 (2020), Cal. Code Regs. tit. 14 section 13186, 13065. Considering the nature of the proceeding, the Commission’s authority to impose bone crushing penalties, and the overt agenda of “making an example” of someone who is alleged to have violated the Coastal Act, this informal and one-sided process is simply not enough to protect the rights of the accused.

The foregoing structural problems with section 30821 ensured that the CCC’s hearing provided the Lents with neither adequate notice nor the required opportunity to respond. The CCC’s proceeding establishing the civil penalty instead looked more like the result of a bidding war instigated by an auctioneer—with the penalty “going to the highest bidder”—rather than a reasoned decision based upon weighing section 30820’s penalty factors in a manner comporting with the Lents’ rights and due process.

Review by this Court is necessary to correct two fundamental errors in how the CCC approached the question before it regarding the penalty to be imposed. It first allowed audience members to “bid up” the penalty while ignoring its own staff recommendation, and it then refused to allow the Lents *to respond* to the audience’s unreasonable demands for an outsized punishment. The trial court recognized these deficiencies; the Court of Appeal ignored them. This Court must review the Appellate Court’s decision to right that wrong.

The Lents were informed prior to the hearing that the staff report recommended the CCC to impose a “penalty in the range of \$800,000 to \$1,500,000,” with the specific monetary recommendation being a \$950,000 penalty. AR 470-471. The staff report also indicated that the maximum fine could be \$8,370,000. AR 500. That roughly \$7,570,000 range in potential penalties created its own notice problems, with it being unclear to the Lents until the hearing, and after they had put on their case and made their arguments, that the Commission intended to deviate upwards from the staff’s recommendation. AR 4231. As the record shows, and as the Lents have challenged, the first request to deviate upward did not come from the

Commission, but from a member of the audience, whose request in that regard came *after* the Lents had completed their presentation. AR 4188-4217, 4231, 4240, 4244, 4246-47.

It was during the public comment period that the bidding war began, with the demand for retribution and punishment escalating rapidly, with successive witnesses in a frenzy to argue for higher penalties. At least one member of the audience demanded that the CCC impose the maximum penalty of over \$8.3 million. *Id.* It was only then that the Commission joined in and began considering an upward departure from the staff-suggested range, while at no time providing the Lents with the opportunity to respond to the audience's demands, or even to the very concept of deviating from the staff recommendation. AR 4259-4310.

This haggling and bidding over the appropriate administrative civil penalty to be assessed violated the Lents' due process rights by depriving them of notice and denying them an opportunity *to respond*. The trial court recognized this fundamental flaw in the underlying CCC proceedings, holding that "due process requires that the Commission comply with this practice and give Petitioners an additional opportunity to present evidence and argue against the \$4.1 million fine." Appellants' App. Vol. II, at 321. The trial court rightfully acknowledged the full panoply of due process rights (notice, opportunity to be heard, opportunity to respond, impartial adjudicator, etc.), and it applied them to the facts and circumstances that led to the Commission's exorbitant penalty. The Court of Appeal, in contrast, glossed over the importance of those protections. This Court must step in to restore the proper balance to protect not only the Lents, but future landowners who find themselves before the Commission addressing the breadth, scope and intent of the Coastal Act.

In sum, the Lents were never given sufficient notice of the penalty to be imposed against them because it was increased *over fourfold* from the staff recommendation in real time, while they were sitting at the hearing. As importantly, the Lents never had the opportunity *to respond in a meaningful way* to the public's escalating demands or to the CCC's decision to increase the penalty. The CCC's procedures deprived the Lents of their right to defend themselves when they were barred from challenging the audience's arguments and demands.

The trial court correctly recognized that, under these particular circumstances, due process demands more than what the CCC provided to the Lents. *See* Slip Op. at 33. The Court of Appeal was wrong in reaching the contrary decision. It is for this Court to review these proceedings and lay down the constitutional marker for future adjudications.

II. Binding Involuntary Adjudications that Occur Outside of the Courts Violate Due Process

There is another, even more fundamental, consideration that also militates against the claim that the Lents received due process. Namely, all binding involuntary adjudications occurring outside the courts that impose legal obligations violate due process.

As a policy matter, benefits accrue from the Coastal Act’s legislative goal of maximizing public access. *See* Pub. Res. Code § 30001.5(c). By focusing on the perceived policy value of levying administrative civil penalties under section 30821 to alleviate alleged violations of the Act’s public access provisions, the Commission missed the important fact that section 30821 necessarily violates regulated persons’ and landowners’ civil rights and civil liberties. The arrogation of judicial power through binding adjudication by the Commission denies those who are regulated from exercising their right to an independent judge, to a jury, and to the full due process of law. This denial happens because the constitutional principle of due process “is not simply due process ... but the due process of law—meaning judicial decisions following the law, in the courts of law, in accord with their essential traditional procedures.” Philip Hamburger, *Is Administrative Law Unlawful?* 254 (U. Chicago Press 2014).

Whenever the government chooses to exercise power through administrative shortcuts, *i.e.*, via section 30821 administrative civil penalties, rather than by a constitutionally permissible pathway, it deprives the penalized party of due process. Here, the Commission’s levying of fines under section 30821 infringes on the Lents’ right to due process of law. Even though the Commission’s decision remains reviewable in the courts, *see McHugh v. Santa Monica Rent Control Board*, 49 Cal. 3d 348, 372 (1989), the constitutional harms will accrue merely by the fact of being subjected to an unlawful proceeding in the first place. Again, this Court must be willing step in to this dispute to ensure that the judiciary holds, maintains and protects its rightful place of deciding disputes, rights and entitlements, and whether someone has complied with or violated the law (among other issues).

The Commission argued before the Court of Appeal that seeking civil penalties under section 30820 through litigation was “arduous” and required “tremendous expenditure of resources.” Cross-Appellant’s Opening Brief at 23. Section 30821’s enactment has, in contrast, led “to much quicker resolution of violations.” *Id.* at 24. The speed and efficiency of the administrative shortcut, achieved in part by dispensing with the procedural protections that accompany litigation before an independent court, makes it a preferable pathway for the Commission and thus more likely to be used in the future.¹ Furthering the desire of the regulatory agency for a “quick” resolution, however, is not the role of the courts, who are instead tasked with ensuring that parties like the Lents are provided with all of their due process rights, most especially when facing millions of dollars in fines. This Court’s review of this case will reinforce those most basic of facts.

¹ Administrative investigation, enforcement, and adjudication processes are inherently coercive, forcing regulated parties into settlement when there has been no independent finding of proof or admission of legal wrongdoing. The Commission’s position that the Lents could have settled for much less than the levied administrative penalty highlights the coercive nature of the process that section 30821 enables. *See, e.g.*, Combined Respondent’s Brief and Cross-Appellant’s Opening Brief 94. Since section 30821’s enactment, the Commission has secured a higher rate of settlements in a faster time. *See* Cross-Appellant’s Reply Brief at 36.

The Due Process Clauses of the California and United States Constitutions are much more than simply a “fly in the ointment” of well-greased administrative proceedings; they are the *sine qua non* for such proceedings themselves. Stated another way, the *very purpose* of the CCC hearing is to ensure protection of the due process rights of landowners such as the Lents; to reach another conclusion would be to say that the Commission may enter any penalty that it chooses without such a hearing. The purpose of the hearing is not, as the CCC would have the Court believe, to make for quick resolution, especially when such quick resolution requires shunting aside the due process rights of the accused. The purpose of the hearing is to allow the Lents (and others like them) to defend themselves.

It matters not that the legislature may have created the slippery pathway, and even incentivized its use through administrative convenience. Legislative sanction of unconstitutional adjudications cannot save them and provides no defense to the unconstitutional nature of binding extralegal administrative adjudications. *Cf. Ohio Bell Telephone Co.*, 301 U.S. at 304-305 (internal citations omitted) (“The right to such a [fair and open] hearing is one of ‘the rudiments of fair play’ assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement [of due process] has been neglected or ignored.”); *see also Endler v. Schutzbank*, 68 Cal. 2d 162, 180 (1968) (quoting *id.*).

Under section 30821, the Commission is empowered to levy an administrative civil penalty just upwards of \$20.5 million for a single violation. Such unchecked power would make the King himself blush. That is especially so when the CCC has ostensibly been granted the power to levy such penalties without *ever providing a full evidentiary hearing*. The Commission instead imposed the penalty here following a truncated public meeting format where the assembled people—holding figurative pitchforks—were invited to vent their anger on the landowners, who were then forbidden from fully defending themselves.

The trial court correctly concluded that the procedures the Commission employed in determining and levying its massive penalty against the Lents were constitutionally deficient.

Because any binding involuntary adjudications that occur outside the courts necessarily violate due process, any future attempts by the Commission to levy an administrative civil penalty against the Lents under section 30821 will also violate the Lents’ due process rights. This Court holds the responsibility of ensuring that future landowners who find themselves in this position are afforded all of the rights to which they are due, including ensuring that they have the procedural protections that are the foundation of our Constitutional Republic.

III. Conclusion

This Court should grant the Petition for Review and ensure that the Lents receive the due process of law to which they are entitled.

Very truly yours,
New Civil Liberties Alliance

 /s/ Harriet M. Hageman
Harriet M. Hageman, Senior Litigation Counsel
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National Federation of Independent Businesses
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 /s/ Elizabeth Milito
Elizabeth Milito
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Certificate of Service

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

I, Fredrick A. Hagen, am a resident of the State of California, over the age of eighteen years, and not a party to the above-titled action. I am also a member of the California state bar (SBN 196220). My business address is Berding & Weil LLP, 2175 N. California Blvd, Suite 500, Walnut Creek, California 94596, fhagen@berdingweil.com, 925 838-2090.

On May 27, 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 efilings system. Those who are not registered, including the trial court and court of appeal listed below, 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 Walnut Creek, California.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of May 2021, at Walnut Creek, California.

/s/ Fredrick A. Hagen
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