

No. \_\_\_\_

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IN THE  
**Supreme Court of the United States**

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CALIFORNIANS AGAINST CORRUPTION, CARL RUSSELL  
HOWARD AND STEPHEN J. CICERO,  
*Petitioners,*

v.

FAIR POLITICAL PRACTICES COMMISSION,  
*Respondent.*

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**Petition for a Writ of Certiorari to the  
California Supreme Court**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Whether the court below erred in affirming imposition of a \$1.1 million election law civil penalty against a defunct nonprofit organization and two of its unemployed officers, while refusing to consider their Eighth and Fourteenth Amendment rights against imposition of cruel and unusual punishments and excessive fines, and requiring pursuit of a mode of review in which assessment of the penalty was subject to a strong presumption of validity.

2. Whether the court below erred in summarily affirming imposition of that penalty for failure to disclose contributors, after the organization and its officers raised triable issues of fact relating to First Amendment defenses under *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), *Bates v. Little Rock*, 361 U.S. 516 (1960), and *NAACP v. Alabama*, 357 U.S. 449 (1958).

3. Whether the court below erred by allowing a state agency serving as law enforcement officer, prosecutor, judge, and jury to impose in absentia, as punishment for expression of opinions and for political acts not involving *mens rea*, a "civil" penalty so disproportionately large it constituted a sentence of lifetime impoverishment and disenfranchisement suitable only to a criminal act, upon two unemployed dissidents too destitute to pay even the interest on it, without permitting the most basic rights accorded a defendant facing the possibility of even one day in jail (jury trial, presumption of innocence, attorney, attorney provided if defendants cannot afford one, right to adequate counsel), or a defendant facing even a \$100 fine (judicial trial, presumption of innocence), creating case defects that exist solely due to their denial of these rights, and then relying on those the very defects in such a way as to deny other established, incorporated federal constitutional rights without judicial trial of any kind.

**PARTIES TO THE PROCEEDING**

See case caption. Petitioner Californians Against Corruption is an unincorporated association with no parent or subsidiaries.

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**PETITION FOR A WRIT OF CERTIORARI**

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Petitioners request that a writ of certiorari issue to review  
the final order of the California Supreme Court.

**OPINIONS BELOW**

The opinion of the California Court of Appeals is reported  
as *Fair Political Practices Commission v. Californians  
Against Corruption*, 109 Cal.App.4th 269, 134 Cal.Rptr.2d  
659 (2003) and reproduced in the Appendix (“App.”) at 1a.  
The California Supreme Court order denying Petitioners’  
petition for review is unpublished and reproduced in the  
Appendix at App. 19a. The Sacramento County Superior  
Court opinions granting summary judgment to Respondents  
and dismissing Petitioners’ counterclaim are unreported and  
are reproduced in the Appendix at App. 23a.

## **JURISDICTION**

On April 29, 2003, the California Court of Appeals affirmed judgment of the Superior Court of Sacramento County, upholding in full the penalty against Petitioners. On September 10, 2003, the California Supreme Court denied review. On December 3, 2003, Justice O'Connor granted application 03A475, extending time to file Petition for Writ of Certiorari until January 10, 2004. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

## **STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED**

Government Code section 91013.5 (Stats. 1984, ch. 670, § 5, since amended) stated:

“In addition to any other available remedies, the commission or the filing officer may bring a civil action and obtain a judgment in small claims, municipal, or superior court, depending on the jurisdictional amount, for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to this title. The venue for this action shall be in the county where the monetary penalties, fees, or civil penalties were imposed by the commission or the filing officer. In order to obtain a judgment in a proceeding under this section, the commission or filing officer shall show, following the procedures and rules of evidence as applied in ordinary civil actions, all of the following:

“(a) That the monetary penalties, fees, or civil penalties were imposed following the procedures set forth in this title and implementing regulations.

“(b) That the defendant or defendants in the action were notified, by actual or constructive notice, of the imposition of the monetary penalties, fees, or civil penalties.

“(c) That a demand for payment has been made by the commission or the filing officer and full payment has not been received.”

### **STATEMENT OF THE CASE**

Petitioner Californians Against Corruption (“CAC”) was formed in 1989 as an unincorporated association and later as a political action committee registered with the Fair Political Practices Commission (“FPPC” or “Commission”), which regulates political activity. CAC’s goal was to oust Senate President David Roberti, Assembly Speaker Pro Tem Mike Roos, Assemblyman Lloyd Connelly, and certain other incumbents, based on evidence of corruption and dishonor of the oath to uphold the U.S. Constitution. CAC opposed Roos in a 1990 election, then notified Roos and his constituents that it was preparing to recall him. Roos resigned in 1991, just 10 weeks after his 1990 election, heading off the recall. CAC opposed Roberti in two 1992 special elections and filed campaign finance reports for them. In 1994, CAC qualified a landmark recall against Roberti that gained extensive national news coverage as California’s first legislative recall since 1914. Roberti survived the recall, but his career in elective politics was ruined, and he blamed CAC’s recall.

CAC was a true grassroots effort with a diverse, all-volunteer staff of political neophytes, including some constituents of Roos and Roberti. In its 7-year history it raised just \$141,000, a tiny sum by conventional political standards. The vast bulk of donations were far less than \$100 each. CAC could not afford professional campaign finance or legal representation. Nor could CAC afford direct mail to voters. Voters instead received CAC’s mail indirectly via volunteers in all 50 states, many living within the district. Each volunteer told CAC how many letters he or she could afford to mail. CAC then mailed the requested number of voter addresses, along with a master letter, to each volunteer, who at his or her own expense photocopied, folded, stuffed, hand addressed,

stamped, and mailed CAC's letter to the voters. CAC's unique grassroots "re-mail" method was covered in the national media (e.g., Wall Street Journal, 5-26-92). Highly effective on a shoestring budget, CAC was increasingly seen as a threat to incumbents.

In 1990, instigated by CAC's opponents, the FPPC threatened CAC with prosecution unless it reported remails as in-kind donations, when it knew CAC had no means to determine how many remails were actually completed, or the materials and time-value of each of hundreds of individual volunteers. The FPPC backed off that demand, while reserving the right to reinstate it. From that point on, CAC's opponents instigated nearly constant FPPC harassment.

As a 26-year incumbent, 13 as Senate President, Roberti wielded considerable power, both official and otherwise, and had a zealous partisan following and media support. CAC's organizers received death threats, App. 24, its headquarters was burglarized, its telephone lines cut. *Id.*

California statutes required CAC to file statements reporting campaign donor identities. Petitioner Howard had filed reports for earlier campaigns, though due to limited resources, he filed somewhat late as is common even with professional campaigns, receiving nominal late fines of \$10 per day, partially waived, as is also common. During the recall, Howard's resources were stretched to the limit as fundraiser, spokesman, and executive director in addition to acting treasurer. Statements ran late, and Roberti instigated intense media pressure on CAC to report. Howard told the media that he would submit the reports as soon as possible, despite his *opinion* that certain aspects of mandatory disclosure were unconstitutional as they were being applied to CAC. Howard was misquoted by a reporter to sound contemptuous of the FPPC. That sensationalized misrepresentation of dissident political opinion was later explicitly

cited by the FPPC as justification for levying against both Howard and Cicero the largest disclosure fine ever issued by any state. (App 4)

At the outset of the recall petition drive, an umbrella group called the Coalition to Restore Government Integrity (“CRGI”) had been formed that included nationally known victims rights, tax limitation, law enforcement, and good government groups. When CRGI reported donor identities, Roberti and the media began to announce their names and addresses in print and over the air, smearing them as extremists, App. 25, and even Aryan supremacists. In fact, the recall was led by a diverse coalition of all races, religions, creeds, and parties. The sponsors listed on the recall petition were 5 former challengers for Roberti’s seat from 5 parties (Democrat, Republican, Libertarian, Green, Peace & Freedom). The scurrilous demonization, with few exceptions aided by the media, was so intense that Howard, the Recall’s Executive Director, was forced to continually combat it, even to the point of publicly announcing that his Great Grandfather was a Rabbi. In light of this atmosphere, CAC supporters called CAC to report fears of reprisal and discrimination due to their association with CAC’s demonized campaign. This caused a chilling effect on CAC’s donors’ and members’ ability to participate in the political process. *Id.* To shield donors from harm in the exercise of 1st Amendment rights, Howard, as acting treasurer, thereafter reluctantly, temporarily and partially declined to itemize donors’ full identities. Trying to balance the spirit of disclosure law against donors’ right to participate in the political process and their need for anonymity in an atmosphere of demonization and harassment, Howard continued good faith disclosure of each donation, together with a partial address (city & state) and either a partial (or more often full) donor name. He never stopped providing itemized expenditures and other required figures. After the election, he disclosed all remaining information to the best of his ability.

The FPPC enforces California electoral statutes and regulates many key aspects of free speech. In 1994, shortly after the recall, the FPPC audited CAC. Howard, then unemployed and deemed disabled by the state for major depression, cooperated fully, to provide every piece of information requested. At the audit, Howard told the FPPC that CAC had submitted a change of treasurer form but was never able to execute that change within the group; that thus Howard had remained de facto treasurer and Petitioner Cicero had not done any of the acts in question other than signing forms that Howard had completed. Howard told the FPPC about his campaign-related job loss and incapacitation; the death threats, break-ins, and donor complaints; the chilling effect on volunteer and donor involvement; and his concern over harassment and discrimination against donors as his reason for temporarily and partially shielding identities and addresses, while acting in good faith to comply despite his political opinions that he had acted constitutionally and that the primary unintended consequence of mandatory disclosure was incumbent protection, by enabling powerful politicians to identify and oppress those who would donate to their opponents. After cooperating with the audit and delivering all of CAC's available records, Howard wrote the FPPC apologizing for any delay, explaining the benign reasons for omissions, and offering continued cooperation.

In 1995, the FPPC commenced civil penalty proceedings against CAC, Howard and Cicero, who were *both* charged as its treasurers with the same 404 counts. 352 of these were multiple counts of the same approximately 100 donations: One count for failure to disclose a donor's full name, one for the same donor's full address, one for the same donor's occupation, one for employer, and one for donation amount; this despite the fact that partial and usually full names, accurate donation amounts, and city and state had been reported in nearly all cases. Moreover, the FPPC knew that CAC had in nearly all cases *not* intentionally withheld

occupation and employer; that CAC had always requested that information from its donors, but was *unable* to provide it to the FPPC because donors had rarely provided it to CAC; that CAC could not force donors to provide it.

The FPPC held a probable cause hearing in Sacramento. Being unemployed and/or disabled, and living in Southern California, Petitioners (hereinafter, “we” or “us”) were unable to travel to Northern California. Nor were we ever properly served, notwithstanding subsequent discovery of fabricated service documents. Howard had told the FPPC that he could not afford counsel. Cicero had written the FPPC that Cicero did “not have the means to retain legal counsel”. We could not afford a lawyer to defend against an agency that was preparing to violate our 8th Amendment and other Constitutional rights by imposing what in essence was a sentence of lifetime impoverishment. For all of these reasons, we could not and did not appear before the FPPC. We did not waive our 8<sup>th</sup> Amendment rights, nor did our inability to appear waive the FPPC of its obligation to obey the US Constitution.

Although FPPC’s statutes require hearings be held before the FPPC or its Executive Director,<sup>1</sup> they were run by its senior (*i.e.*, enforcement) staff.

When assessing penalties, FPPC statutes require it to credit good faith efforts to comply and cooperate. The FPPC knew

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<sup>1</sup> The Commission itself is charged with holding the probable cause hearings. Calif. Gov. Code § 83116. The Commission has by regulation delegated this power to the Executive Director. Calif. Code Regs., title 2, § 18361(d)(4). In this case the chairman, acting alone, improperly purported to delegate the power to hold hearings to one Jeevan Ahuja, Senior Commission Counsel, who made the probable cause finding. The chairman later purported to delegate to two other employees the power to act as the Executive Director. One of these then assessed the penalty against Petitioners. The Commission subsequently voted to adopt the decision thus arrived at, upholding improper delegation of power in such a way as to impose clear 8th Amendment violation. Moreover, the Commission itself was improperly constituted, due to over-30-day vacancies violating its balance of power clauses.

Howard had acted without *malum in se* and that Cicero had not acted. The FPPC knew Howard alone had acted to shield donors from harassment and preserve their 1st Amendment rights. The FPPC knew that even while partially withholding identities, Howard continued in good faith disclosing accurate donation and other figures. The FPPC knew CAC's later full disclosure had effectively turned the earlier partial non-disclosure into late form filings, which would have carried a maximum fine of only a few thousand dollars in total. Though Petitioners were unaware of US Supreme Court decisions sanctioning anonymity under such conditions, the FPPC surely knew of them. The FPPC knew that Howard was disabled; that we were both unemployed, virtually destitute, and unable to hire a lawyer.

Despite knowledge of mitigating evidence, lack of harm done, good faith initial disclosure to the extent consistent with donor protection, later full disclosure and full cooperation prior to the hearing, our financial and physical condition, and the unconscionable disproportionality, cruelty and uniqueness of the punishment compared to much smaller FPPC fines levied for far graver violations involving millions of dollars and *malum in se* by extremely wealthy political professionals and business interests, the FPPC staff denied the existence of any good faith, cooperation, or mitigating factors. All mitigating evidence such as our unemployment, Howard's incapacitation, ultimate full disclosure and extensive audit cooperation were withheld from the Commission. Violating their duty to obey the US Constitution, the FPPC assessed the maximum \$2,000 penalty for each alleged violation, a total of \$808,000, in joint and several liability. The Commission voted to affirm the penalty, five times the total funds CAC raised in its entire 7-year history, and Roberti attended the proceedings. It is still the largest disclosure fine ever issued by any state, and was by far the largest penalty assessed in the FPPC's history, exceeding the total of all FPPC fines in its first 15 years of existence, far exceeding

FPPC fines against multimillionaire politicians and corporations for money laundering and other frauds in the millions of dollars. E.g., [www.opensecrets.org/regulation/penalties/agency.htm](http://www.opensecrets.org/regulation/penalties/agency.htm). So far as Petitioners can ascertain, it marks the only time the FPPC has itemized each possible aspect of a violation and imposed the maximum penalty on each. *Compare Los Angeles Taxpayers Alliance v. Fair Political Practices Commission*, 14 Cal. App. 4th 1214, 18 Cal. Rptr. 2d 472 (1993) (\$6,000 penalty for three improper mass mailings; size of mailings unstated except for the statutory definition, viz., more than 200 letters mailed.)

Howard had provided accurate donation amounts in nearly all cases, but the FPPC fined us as if these amounts had not been provided.

35 counts (\$70,000 in fines) were for inadvertently failing to itemize street addresses of recipients of a few thousand dollars in expenditures, all of which had been accurately itemized along with the vendor name, date, etc. Thus, one flawed aspect of each item was used to impose the maximum fine for that item, as if there had been total non-compliance. Other counts were for failure to keep various records such as bank statements, when in fact Howard had not only kept such records *but the FPPC was in possession of them*.

Had Howard failed to file any reports at all, the total fine would have been at most \$12,000. The FPPC used incomplete information in his reports to generate almost 400 violations. Certainly, incomplete reporting was better than not filing reports at all. Worse than failing to credit Howard's good faith cooperation and partial disclosure, the FPPC had punished us for it, relying on Howard's partial disclosure (and later full disclosure) in order to fine us orders of magnitude more than had there been no disclosure at all followed by late form filings.

The fine is excessive and unreasonable, and therefore an unconstitutional atrocity.

California law provides two avenues to challenge constitutionality and legality of such an assessment. First, direct review via suit for writ of mandate. Second, because the FPPC regulates political activity, statutes provide that in suing to enforce penalty, the FPPC bears the burden of proving the penalty was assessed in accord with the procedures in the relevant portions of the statute; electoral statutes also require the courts to exercise oversight and determine proper imposition. App. 4-5.

On January 3, 1996, before we could obtain legal representation, the FPPC sued us, seeking a money judgment for the penalty. By January 17, 1996, we were able to hire an attorney to cross-complain and seek writ of mandate. Our cross-complaint asserted, *inter alia*, that assessment of the penalty violated freedom of expression and that the amount violated Eighth and Fourteenth Amendment protections against excessive fines. App. 29.

The action languished for several years, neither side moving for trial. Our succeeding attorney attended several court hearings that the FPPC missed with impunity, due to a custom allowing government agencies a special preference to offer the excuse that they were too busy to show up. For example, the FPPC failed to appear at a status conference on March 6, 1997. Our attorney, who had already been paid our entire donated defense funds of around \$50,000, told us that the court and the FPPC had forgotten about the case; advised us to do nothing; assured us that it was incumbent on the FPPC to move, that their case would be dismissed if they did not, but that we faced no such risk by waiting. In early 2000, the FPPC contacted our attorney about getting the case back on schedule. Instead of going along with that, he told the FPPC he would file to dismiss their case, which he then did, and the FPPC responded in kind. Inexplicably, our attorney

repeatedly advised the court, incorrectly, that we had disappeared and he had no way to contact us. On August 4, 2000, the Superior Court, *per* Judge Lloyd Connelly, dismissed our counterclaim for lack of prosecution, while denying a motion to dismiss the enforcement action for money judgment on the same ground. App 20-21.

After discovering that Judge Connelly was former Assemblyman Connelly, who CAC had named as a recall target, whose firm had represented Senator Roberti's PAC while he was a partner, and whose own PAC had contributed to Roberti's and Assemblyman Roos' PACs, we moved unsuccessfully to recuse him and vacate his order.

The FPPC then moved for summary judgment. In opposition, we again asserted First and Eighth Amendment claims, and the fact that the FPPC's employees had not been duly empowered to conduct hearings and assess the penalty. The Superior Court ruled that the constitutional claims were barred by dismissal of the mandate cross-complaint, and that the employees' power to hold hearings could not be challenged in an enforcement action. It entered summary judgment for the FPPC (App. 22-23), in an amount by then grown, with interest, to over \$1,100,000. We appealed to the California Court of Appeals, which affirmed. App 17. The Court of Appeals dealt with the First and Eighth Amendment objections by ruling that these must be raised in a mandate action (which had, as noted above, been filed but unconstitutionally dismissed) rather than in an action to enforce, App. 14, that the assessing officer had apparent authority which likewise could not be challenged in an enforcement action, and that the requirement for the FPPC to prove its actions consistent with the statutes referred only to its following of statutory procedure other than the Constitution and the manner of appointment of its agents. The effective result of this application was that the FPPC must prove its penalties are properly imposed, except as to any issue that would keep it from winning this particular case and

prevent an unconscionable fine amounting to a sentence of lifetime impoverishment against Howard and Cicero.

Our appellate attorney sought review in the California Supreme Court, raising the 8th Amendment. App. 18. However, he submitted the petition at the last minute without our review and so without our permission failed to raise the 1st Amendment and other issues. He then failed to correct misrepresentations of our position. For example, we were characterized as not diligent for failing to attend the FPPC hearing, without mention of our inability to afford legal representation. A similar statement was made about the dismissal for lack of diligence in moving our petition for writ of mandate, when he knew that our attorney had advised us to not to move it).<sup>2</sup> The California Supreme Court denied review. App. 19.

### **REASONS FOR GRANTING THE WRIT**

#### **I. THE CALIFORNIA COURT'S DECISION DEPRIVES PETITIONERS OF A REASONABLE OPPORTUNITY TO HAVE THEIR RIGHTS HEARD AND DETERMINED.**

While it is hornbook law that this Court will not consider a challenge where the lower court's determination rests upon independent State ground, this Court has recognized an exception where the lower court failed to allow Petitioners "a reasonable opportunity to have the issue as to the claimed right heard and determined by that court." *Central Union Telegraph Co. v. Edwardsville*, 269 U.S. 190, 194-95 (1925).

There is no question the California courts had the power to determine the constitutional issues. A writ of mandate had been sought, and its dismissal was based purely upon discretion. As this Court recognized,

“[W]here a State allows questions of this sort to be raised at a late stage and be determined by its courts as a

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<sup>2</sup> The FPPC's missed hearings were not mentioned.

matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.”

*Williams v. Georgia*, 349 U.S. 375 (1955). Here, the California courts utilized their discretionary powers to avoid resolution of the constitutional issues posed. First, they dismissed the mandate action. Second, utilizing the same discretion, they declined to dismiss the enforcement action. Finally, they held that the constitutional claims could not be raised in the enforcement action.

The California courts ruled that we had exhausted our judicial remedies. In fact, the courts discretionarily exhausted them for us. In a case similar to ours, *County of Sauk v. Trager*, 118 Wis.2d 204, 346 N.W.2d 756 (1984), the Wisconsin Supreme Court examined the exhaustion of judicial remedies doctrine, ruling that a court should permit a defendant in an enforcement proceeding who did not prevail on a writ petition to challenge an administrative decision if on balance 4 factors weigh in favor: (1) legal issues the same in the writ and the enforcement action, (2) no factual disputes, (3) agency decision suspect on its face, and (4) not permitting defense would be harsh. (*Id.* at p. 215-216, 346 N.W.2d at pp. 761-762.) Our defenses were the same as in our writ petition (violated Excessive Fines Clause; imposed in excess of jurisdiction.) We presented no factual disputes. The fine was suspect on its face as the largest the FPPC ever imposed; on entities who could not pay it; by two “Acting Executive Directors”, neither of whom were properly appointed. In determining the fine’s size, the FPPC considered that Howard had “blatantly spoken out in the media on [his] disregard for the laws of the FPPC”, and failed to consider any mitigating factors. Not letting us present our defense was harsh,

especially since the fine is not dischargeable in bankruptcy (11 U.S.C. § 523(a)(7) [exempting fines from discharge]). The fine has the potential to ruin our lives, precluding buying a house, accumulating savings, even holding jobs. It was unduly harsh to permit the FPPC to obtain a huge judgment against us without the trial court considering the merits of our constitutional and statutory challenges. Had the state courts adopted the *Sauk v. Trager* standard, we would have been able to present a defense.

The due process clause precludes states and state courts from hiding behind and applying state law doctrines and niceties so as to impose unconscionable violations of fundamental rights. In determining federal due process in light of this monstrous fine, the court below could have used the *Sauk v. Trager* standard set by another state court of last resort, could have allowed a defense, could have and should have refused to apply doctrines mechanically and mercilessly to affirm a sentence of lifetime impoverishment.

## **II. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AND FLIES IN THE FACE OF THIS COURT'S RULINGS.**

The Eighth and Fourteenth Amendments impose a limit on civil penalties. The “excessive fine” and “cruel and unusual punishments” provisions of the former relate to “punishments,” not merely “criminal proceedings.” *Austin v. United States*, 509 U.S. 692 (1998); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of North America, Inc. v. Gore*, 517 U. S. 559 (1996). There is little question the million-dollar penalty imposed here was intended as “punishment” by a state agency.

The rulings below hold that we could not raise the excessive punishment issue in the judicial enforcement action, but

only in an action for mandate. As we show above, we brought such an action as a counterclaim, then Judge Connelly dismissed the counterclaim for lack of prosecution while continuing with the enforcement action, generating a result which deprived us of any reasonable opportunity to fairly present our constitutional claims.

There is a second reason why the result below offends the Eighth Amendment and deprives us of any fair chance to assert our rights. The holding below is that an Eighth Amendment defense to an administrative action may only be asserted by petition for a writ of mandate. Under California law, even when fundamental rights are at stake, the standard of review in mandate actions is limited. While the court is empowered to exercise independent judgment in such cases, the petitioner bears the burden of proof, and must overcome a “strong presumption” that the administrative decision was correct. *Fukuda v. City of Angels*, 20 Cal.4th 805, 977 P.2d 693, 85 Cal.Rptr.2d 696 (1999).

This flies in the face of this Court’s decision in *Cooper Industries, Inc.*, *supra*, that jury awards of punitive damages must be reviewed *de novo*. In *Cooper Industries, Inc.*, the plaintiff at least bore the burden of proving to an impartial jury the appropriate amount of award, before appeal was taken. Here, the decision from which judicial review was sought was imposed by an enforcing agency—indeed, due to the illegal appointment of the agency’s deciding officials, by the very officials who were charged with enforcement. We were not given trial by jury, but trial in absentia by prosecutor, yet from this decision the only appeal is one in which the accusation and penalty are given strong presumption of correctness.

The courts also adopted and applied a novel version of the *de facto* officer doctrine, knowing that the result in this case would be unconstitutionally severe.

Should the California disclosure statute not be held unconstitutional as applied in this case, the fine should be held excessive by the reasoning in *Austin v. United States*, 509 U.S. 602 (1993) and *Alexander v. United States*, 509 U.S. 544 (1993), which held that whether state fines were excessive is a federal question under the 14th Amendment and enabling legislation thereto, and that such question when raised, as it was in this case, must be decided on its merits.

### **III. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES PETITIONERS OF THEIR FIRST AND FOURTEENTH AMENDMENT RIGHTS**

As this Court has recognized,

“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.) . . . Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”

*NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

There is no doubt *NAACP v. Alabama* is applicable to campaign contribution reporting. “Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably.” *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). The *Buckley* Court declined to reach the issue, since the risk of donor harassment was “highly speculative” in that case, although the Court noted,

“Where it exists the type of chill and harassment identified in *NAACP vs. Alabama* can be shown. We cannot assume that courts will be insensitive to similar showings when made in future cases.”

424 U.S. at 74. Our case presents the context not presented in *Buckley*. CAC’s cause angered followers of a powerful official. Its headquarters was burglarized; its telephone lines cut; death threats issued against its officers. Names of CAC members and donors were announced and denounced, and they contacted us with understandable fears of reprisals. (App. 24-28) The California courts’ summary disposition precluded us from asserting legitimate 1st and 14th Amendment claims. Their requirement that the issue be raised in a mandate proceeding, where a strong presumption exists that the agency’s actions were proper, limits fair presentation and reverses the burden of proof.

This First Amendment issue was raised in the Superior Court cross-complaint, (App. 29) and as a disputed fact on the motion for summary judgment in the enforcement action (App. 24-25), but only as a footnote in the California Court of Appeals. This Court, however, retains power to consider issues not fully raised below, where the error is plain and separate basis for jurisdiction is evident. *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980); *Vachon v. New Hampshire*, 414 U.S. 478, 479 (1974). If the Court should accept jurisdiction based upon questions I and II, *supra*, we would request that the Court also give consideration to this basis for certiorari.

Per *McConnell v. FEC*, 540 US\_ (2003), the FPPC may not constitutionally regulate all political activity, but only that which may result in “corruption or the appearance of corruption”. It infringes the First Amendment to apply such disclosure legislation to oppose or recall candidates. There may be corruption or its appearance in donating to or spending in close coordination with a candidate, or opposing his main challenger whereby he can be expected to benefit, or supporting legislation to redistribute the burden and benefits of taxing and spending to benefit supporters. But independent expenditure to expose corruption is inherently less susceptible to corruption or its appearance. The burden should be on regulators to show that such political activity is corruptive, or apparently so, to public choice.

Discretion was exercised in this case so as to single out for punishment at a criminal level an effort not to elect a candidate to advance the donors’ cause, or adopt legislation to further donor rent-seeking, but only to remove elected officials for causes set forth in our published literature. This appears to be retaliation against dissenters and their supporters, not a way to inhibit corruption. The First Amendment was intended to protect such dissent.

The FPPC has not shown that any funds collected or spent by CAC was for a particular candidate for elected office, or for rent-seeking legislation. Failing such a showing, the act which the FPPC attempts to enforce in this case should be held unconstitutional as applied.

#### **IV. THE DECISION OF THE CALIFORNIA COURTS DEPRIVES US OF OUR 6TH AND/OR 7TH AMENDMENT RIGHTS.**

The court below erred by allowing a state agency serving as law enforcement officer, prosecutor, judge, and jury to impose in absentia a “civil” penalty of \$1,100,000, while denying the most basic rights accorded criminal defendants.

Is there any outer limit to the concept of “civil” penalties before they become criminal in their harshness?

Had we been charged by a *prosecutor* with an offence carrying a \$100 fine, we would have been entitled to presumption of innocence and full judicial trial.

Had we been charged with an offence bearing penalty of just one day in jail, federal law would have entitled us to presumption of innocence, full judicial trial, and an attorney paid for because we could not afford one. California law would have entitled us to jury trial. Inadequate representation by counsel, which we suffered repeatedly and caused severe defects in our case, would have been grounds for appeal.

Although it was held in *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211 (1916) that the 7th Amendment protection of trial by jury in controversies involving substantial amounts of money was not incorporated by the 14th Amendment, we ask the Court to revisit this issue, as in this case the amount is punitive and justifies Fifth Amendment protections, both as a penalty suited only to a crime is involved, and because due process in such deprivation of property at least requires a trial, not just a ruling on a motion for summary judgment.

Ours is a penalty fit for a true crime; its severity far exceeds punishments imposed for most criminal acts, even many involving victims. Describing it as a non-criminal penalty with a name that hides its essence enabled it to be imposed in circumvention of safeguards and rights honored even in minor criminal cases that result in tiny penalties.

The courts should not let the FPPC circumvent the rights of those facing a severe, crime-sized penalty, simply by letting them call it something else. Nor should the courts let agencies serving as law enforcement officer, prosecutor, judge, and jury unleash unlimited financial ruin absent the safeguards intended to ensure that it is properly visited and deserved.

With defendants facing such powers under one roof, the courts should apply a standard of due process for an agency's defendants constitutionally commensurate to the greater danger of abuse and harm than that faced by defendants in private suits. Defendants facing penalties suitable only to crimes, issued by agencies with relatively unlimited prosecutorial resources, should be afforded rights that were intended to be commensurate with such penalties and resources. Such defendants should have a right to jury trial under the 6th or 7th Amendments, to an attorney if they cannot afford one (or at least competent and ethical representation if they must pay for it), and to a presumption of innocence.

If such rights are not afforded, then a standard of due process should not be tolerated that turns rights into privileges effectively available only to the rich and powerful, which pretends grassroots dissidents facing total ruin are equal in resources to wealthy politicians, corporations and political parties facing far smaller fines, and mercilessly demands the same level of legal diligence.

Courts should not let agencies create case defects that exist solely due to denial of rights, then rely on those very defects in such a way as to deny other federal constitutional rights without judicial trial of any kind; a rigged, circular denial of rights that is effectively a constitutional Catch-22, insurmountable to few but the wealthy and powerful.

The defects in our case exist due to the denial of such rights. In that regard we hope that—if what we could afford to have in our appendix is insufficient to consider our case—this court will take notice of all court records in this case that we could not afford to place there, such as Appellant's Opening Brief and appendices, Case No. 96AS00039 Appeal from Superior Court for the County of Sacramento, *FPPC v. Californians Against Corruption, et. al.* Some of these are available on [www.cacdefensefund.org/doc\\_link.html](http://www.cacdefensefund.org/doc_link.html)

## CONCLUSION

As Americans, we believed that even dissident grassroots neophytes who could not afford effective legal representation could peaceably assemble to express political opinions and participate in the democratic process without being singled out for destruction and in many ways disenfranchised by a government agency. We were wrong.<sup>3</sup>

We did not waive our 8th Amendment rights or any others. At every level of the California courts, they were discretionarily waived for us in a way that affirmed a sentence of lifetime impoverishment, without trial, on questionable state law procedural grounds, in clear violation of state code requiring the courts to exercise oversight. Should there not be a higher standard of due process when the result of “waiving our rights” is so extreme?

Even if we had affirmatively waived our rights, would that waive FPPC officers and state judges from their duty to honor their sworn oath not to apply laws and doctrines so as inflict unconscionable violations of those rights? If we could be barred from asserting our right not to be tortured, would that give state officers and judges the right to torture us? Would they not still bound by their own affirmative oaths to defend the 8th Amendment?

The courts below should have imposed exceptions not just as to state law, but because they were constitutionally compelled to do so in this case.

We may be dissidents; we may have made mistakes; some of our political opinions may have angered powerful incumbents and the agency we believe protects them. But is that reason to destroy our lives or deem us expendable?

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<sup>3</sup> Due to the fine, CAC is defunct, and its leadership no longer participates in the democratic process.

We love this country deeply, and we see this petition as a heartfelt plea to restore our citizenship. Is there no room in our great nation for two grassroots political dissidents who meant no harm and basically did none, however irritating our opinions may be?

We respectfully plead that the Court grant writ of certiorari to review the decision of the California Supreme Court, and that the judgment against us be dismissed or remanded to the California Supreme Court for decision consistent with our constitutional rights.

Respectfully submitted,

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