PACIFIC LEGAL FOUNDATION

February 21, 2018

The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *Central Coast Forest Association v. Fish & Game Commission*, No. S247021

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pacific Legal Foundation (PLF) files this letter brief as Amicus Curiae pursuant to Rule 8.500(g) of the California Rules of Court. For the reasons stated herein, PLF respectfully requests that the Court grant the petition for review filed on February 13, 2018, in the above-referenced case.

Identity and Interest of Amicus Curiae Pacific Legal Foundation

PLF is the nation's oldest and most successful public interest legal organization that advocates for the protection of private property rights and related liberties in courts throughout the country. Too often, environmental laws can be misinterpreted or misapplied in a way that harms these freedoms. To fight back against this phenomenon, PLF has regularly appeared before this Court to urge a balanced approach to the interpretation of environmental statutes. *E.g.*, *Cent. Coast Forest Ass'n v. Fish & Game Comm'n*, 2 Cal. 5th 594 (2017); *Tuolumne Jobs & Small Business Alliance v. Superior Court*, 59 Cal. 4th 1029 (2014); *Envtl. Protection Info. Ctr. v. Cal. Dep't of Forestry & Fire Protection*, 44 Cal. 4th 459 (2008); *Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Protection*, 43 Cal. 4th 936 (2008); *Mountain Lion Found. v. Fish & Game Comm'n*, 16 Cal. 4th 105 (1997).

Unfortunately, the decision below succumbs to the misinterpretation temptation by upholding the Fish and Game Commission's skewed construction of the California Endangered Species Act, Fish & Game Code §§ 2050-2100. That construction gives the Commission nearly unfettered authority to list populations of flora and fauna no matter how insignificant or factitious. *See* slip op. at 52 ("[N]either [the California Endangered Species Act] nor any state regulation requires that a

population be an important component of the evolutionary legacy of the species before it can be included as an endangered species."). For this reason, PLF is interested in the case and urges the Court to grant the petition to address—and appropriately narrow—the Commission's listing power. *See Kerr's Catering Serv. v. Dep't of Industrial Relations*, 57 Cal. 2d 319, 329-30 (1962) ("[I]t is fundamental in our law that an administrative agency may not, under the guise of its rule-making power, abridge or enlarge its authority or act beyond the powers given to it by the statute which is the source of its power . . . .").

Argument

Supreme Court Review Is Necessary To Settle the Important Legal Issue of the Extent to Which the California Endangered Species Act Authorizes the Protection of Populations Smaller Than "Species" or "Subspecies"

Below, the court of appeal affirmed the Commission's inclusion of Coho salmon south of San Francisco Bay as part of the protected Central California Coast population of the pan-Pacific Coho salmon species. *See* slip op. at 52-55. The Commission's action is predicated upon its authority to list populations smaller than a full species or subspecies, a power upheld in *California Forestry Association v. California Fish & Game Commission*, 156 Cal. App. 4th 1535 (2007). Slip op. at 52. The decision below therefore presents the Court with the opportunity to address the underlying statutory question decided in *California Forestry Association*. Pet. for Review 20-21. Such review is merited: *California Forestry Association* gravely misconstrues the California Endangered Species Act, providing the Commission essentially limitless authority to protect any population, no matter how ecologically marginal.

California Forestry Association concerned a challenge to the Commission's listing of two "evolutionarily significant units" of Coho salmon that dwell (in part) in Northern and Central California. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1543-44. The California Endangered Species Act directs the Commission to protect "endangered species" and "threatened species," *see* Fish & Game Code § 2070, which in turn are defined in relevant part as any "native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant," *id.* §§ 2062, 2067. The principal ground for the challenge in *California Forestry Association* was that the Commission has no

authority to protect population units that are smaller than a "species" or "subspecies," and thus had no power to list the evolutionarily significant units of the Coho species at issue in the case. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1544-45.

The court of appeal disagreed, adopting instead a broad, non-scientific interpretation of the phrase "species or subspecies." *See id.* at 1546-49. Specifically, the court of appeal interpreted "species" to mean any group of individuals having common attributes and designated by a common name, and interpreted "subspecies" to mean any "subgroup" of a "species." *Id.* at 1545. Because the phrase "species or subspecies" is purportedly susceptible to this non-scientific interpretation, the court of appeal concluded that it is ambiguous. *Id.* For that reason, the court of appeal proceeded to rely upon the California Endangered Species Act's conservation purposes to construe the Act to authorize the Commission to list groups smaller than species or subspecies. *See id.* at 1546-47. In other words, the court of appeal's ruling lets the Commission do whatever it likes, so long as "whatever it likes" plausibly furthers wildlife conservation.

The decision in *California Forestry Association* commits a host of interpretive errors which, given the decision's broad sweep and its critical role in the ruling below, merit this Court's corrective review.

First, the decision departs from the statute's plain meaning. *Cf. Cal. Teachers Ass'n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 632 (1997) ("In interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law, whatever may be thought of the wisdom, expediency, or policy of the act." (quotation marks and citations omitted)). The California Endangered Species Act authorizes the protection of "species" and "subspecies," without any reference to subpopulations. *See* Fish & Game Code §§ 2062, 2067. An evolutionarily significant unit, however, is by definition merely *a part* of a larger taxonomic unit; it is not the equivalent of a species or subspecies. *See* Nat'l Oceanic & Atmospheric Admin., Policy on Applying the Definition of Species Under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612, 58,618 (Nov. 20, 1991) ("To be considered an [evolutionarily significant unit], the population must . . . represent an important *component* in the evolutionary legacy *of the species*." (emphasis added)).

Second, the decision ignores the relevance of the federal Endangered Species Act. *Cf. San Bernardino Valley Audubon Soc'y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 604 (1996) (observing that the Legislature followed the federal Endangered Species Act "in many respects" when it enacted the California Endangered Species Act, and that "the stated policies underlying the two statutes are virtually identical"). Since 1973, the federal Act has expressly authorized the listing of populations smaller than a species or subspecies. *See* Endangered Species Act of 1973, Pub. L. No. 93-205, § 3(11), 87 Stat. 884, 886 (Dec. 28, 1973) (defining "species" to include "any other group of fish or wildlife . . . in common spatial arrangement that interbreed when mature"); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 2(5), 92 Stat. 3751, 3752 (Nov. 10, 1978) (amending "species" to include "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature"). *Cf.* 56 Fed. Reg. at 58,612 (evolutionarily significant units are a type of distinct population segment). The Legislature knew of this federal precedent when, in 1984, it considered passage of the California Endangered Species Act. *See People v. Harrison*, 48 Cal. 3d 321, 329 (1989) ("The Legislature . . . is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof."). Yet the court of appeal in *California Forestry Association* implausibly inferred from this history that the Legislature merely wished to avoid *limiting* the Commission's listing authority to the specific types of subgroups that the federal Act authorizes, and thus left the issue entirely to agency discretion. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1548-49. The much more natural inference, however, is that the Legislature's decision not to include an express provision authorizing the protection of subgroups of flora and fauna reflects a desire to *depart* from the federal model and *not* to authorize the protection of such subgroups. *See J.R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union*, 208 Cal. App. 3d 430, 442 (1989) ("The omission of a provision contained in a foreign statute providing the model for action by the Legislature is a strong indication that the Legislature did not intend to import such provision into the state statute."). That conclusion is particularly well-supported here, given that the federal Endangered Species Act's generous allowance for the protection of subgroups soon precipitated significant controversy, which the Legislature in 1984 may reasonably have wished to avoid by denying the Commission the power altogether. *See* S. Rep. No. 96-151, at 7 (1979) ("[T]he committee is aware of the great potential for abuse of this authority [to list distinct population segments] and expects the [Fish and Wildlife Service] to use the ability to list populations sparingly . . . ."); U.S. General Accounting

Office, Endangered Species: A Controversial Issue Needing Resolution 52, 59 (1979) (observing that subgroup listings "could increase the number of potential conflicts between endangered and threatened species and Federal, State, and private projects and programs," and that "recovery efforts would be maximized by expending the limited funds available on species which are endangered or threatened throughout all or a significant portion of their ranges").

Third, the decision ignores the statutory context in which the phrase "species or subspecies" occurs. *Cf. Baxter v. Cal. State Teachers' Retirement Sys.*, 18 Cal. App. 5th 340, 356 (2017) ("The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (quotation marks and citation omitted)). In *California Forestry Association*, the court of appeal thought it reasonable to expect the Legislature, when passing comprehensive species protection legislation, to use the phrase "species or subspecies" not in its usual scientific sense when applied to flora and fauna, *see* Lawrence R. Liebesman & Rafe Petersen, *Endangered Species Deskbook* 13 (2003) (noting that the term "species" "has a generally understood biological significance" and the term "subspecies" "is common in biological literature"), but rather in an obscure or unusual sense, *see Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545 (construing the phrase in "nonscientific terms"). That is contrary to the "first thing" that courts should do when "read[ing] a statute"—namely, to interpret its words "in an *ordinary* way unless special definitions are provided." *Prof'l Eng'rs in Cal. Gov't v. Wilson*, 61 Cal. App. 4th 1013, 1019-20 (1998) (emphasis added). Not surprisingly, the federal Act's use of "species" and "subspecies" has been construed scientifically. *See* 50 C.F.R. § 424.11(a) ("In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group."). *Cf.* 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:29, at 480-83 (2014) ("Technical terms or terms of art in a statute have their technical meaning, absent legislative intent to the contrary, or other overriding evidence of a different meaning." (footnotes omitted)). Despite this strong evidence against a non-scientific interpretation, the court of appeal believed its construction of the phrase "species or subspecies" to be justified because it would purportedly further the conservation goals of the California Endangered Species Act. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545-47. Yet

this line of argument puts the cart before the horse: recourse to purpose and supposed legislative intent is proper if the statutory language is ambiguous, but legislative purpose may not be used to depart from plain meaning. *See Boy Scouts of Am. Nat'l Found. v. Superior Court*, 206 Cal. App. 4th 428, 443 (2012) ("*If* the statutory terms are ambiguous, [courts] may examine extrinsic sources, including the ostensible objects to be achieved . . . .") (emphasis added).

The harm of these interpretive errors is amplified by the decision's environmental setting. In affording the Commission an essentially unlimited power to list any group of flora and fauna, no matter how small or biologically trivial, the decision institutionalizes bad conservation policy. *See* Berry J. Brosi & Eric G. Biber, *Statistical inference, Type II error, and decision making under the US Endangered Species Act*, 7 Front. Ecolo. Environ. 487, 493 (2009) ("Protection of a spurious subspecies (i.e., a population that is not truly biologically distinct from its abundant and widespread conspecifics) takes away resources from other species, subspecies, or populations that need protection."); Rob Roy Ramey II, *et al.*, *Genetic relatedness of the Preble's meadow jumping mouse (*Zapus hudsonius preblei*) to nearby subspecies of* Z. hudsonius *as inferred from variation in cranial morphology, mitochondrial DNA and microsatellite DNA: implications for taxonomy and conservation*, 8 Animal Conservation 329, 341 (2005) (The listing of "an invalid taxon . . . affects other species because limited conservation resources are then misallocated."). According to the rule adopted by *California Forestry Association*, the Commission potentially may list any "subgroup" of any group of individuals bearing common characteristics. *See Cal. Forestry Ass'n*, 156 Cal. App. 4th at 1545 ("Defined broadly, a 'species' is a class of individuals having common attributes and designated by a common name . . . and a 'subspecies' is a 'subgroup' . . . ." (some internal quotation marks and citation omitted)). Thus, the Commission can choose to protect the "Sacramento Capitol Park" sparrow, or the "Union Square" mouse, or, per the decision below, marginal and artificially sustained subpopulations of Coho salmon dwelling south of San Francisco Bay. As the Legislature surely understood when enacting the California Endangered Species Act, "species protection imposes substantial costs on society, and in particular on those individuals who own or otherwise depend on the use of land which harbors the species." Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L.Q. 1029, 1140 (1997). Given those costs, as well as the unavoidable constraints of any wildlife conservation policy, s*ee* John Copeland Nagle, *Playing Noah*, 82 Minn. L. Rev. 1171, 1192 (1998)

("[W]e can probably save any species, but we cannot save every species."), it is improbable that the Legislature intended to grant the Commission the sweeping listing power that *California Forestry Association* recognized.

Conclusion

The Commission's power to list populations smaller than species or subspecies under the California Endangered Species Act raises a significant issue affecting property owners and conservation policy throughout the state. The petition for review should be granted.

Sincerely,

DAMIEN M. SCHIFF
Attorney

cc: All Counsel

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 21, 2018, a true copy of AMICUS LETTER BRIEF OF PACIFIC LEGAL FOUNDATION 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 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 21st day of February, 2018, at Sacramento, California.

TAWNDA ELLING

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The Supreme Court of California