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June 30, 2023

Honorable Patricia Guerrero, Chief Justice
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: *Friends of Oceano Dunes v. California Coastal Comm'n*, 90 Cal. App. 5th 836 (2023)
Court of Appeal Case: 2d Civil No. B320491
Amici Curiae Letter in Support of Request for Depublication

To the Honorable Patricia Guerrero, Chief Justice, and the Honorable Associate Justices of the Court:

Pursuant to Rule 8.1105(e)(2) and 8.1125(a) of the California Rules of Court, the American Civil Liberties Union Foundation of Southern California ("ACLU SoCal"), and the American Civil Liberties Union Foundation of Northern California ("ACLU NorCal") (collectively, "ACLU NorCal and SoCal") respectfully write in support of a request for depublication of the Court of Appeal's Opinion in the matter of *Friends of Oceano Dunes v. California Coastal Commission*, Court of Appeal, Second Appellate District, Division 6, Case No. B320491 ("*Friends*").

INTEREST OF ACLU SOCIAL AND NORCAL

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan membership organization with approximately 2 million members, dedicated to the defense and promotion of the guarantees of individual rights and liberties embodied in the state and federal constitutions. ACLU NorCal and SoCal are regional affiliates of the ACLU and have extensive expertise in bringing public interest litigation to vindicate these rights. ACLU NorCal and SoCal have intervened in past state court cases where they or their members had a direct interest in the matter of the litigation and where that interest was likely to be directly impacted by the outcome of the litigation. For example, in 2019, ACLU NorCal and SoCal successfully intervened in several cases involving "The Right to Know Act," Senate Bill 1421, Chapter 988 (Cal. 2018), and the disclosure of records relating to police uses of deadly force, sexual assault, and acts of dishonesty with respect to reporting, investigation, or prosecution of a crime. *See, e.g., Bakersfield Police Officers Ass'n. v. City of Bakersfield*, No. BCV-19-1008718 (Super. Ct. Kern Cnty., 2019); *Los Angeles Police Protective League v. City of Los Angeles*, No. 18ST-CPO-3495 (Super. Ct. Los Angeles Cnty., 2018); *Carlsbad Police Officers Ass'n. v. City of Carlsbad*, 49

Cal. App. 5th 135, 153 (2020); *Antioch Police Officers' Ass'n. v. City of Antioch*, No. N19-0170 (Super. Ct. Contra Costa Cnty., 2019).

Intervention plays a key role in fulfilling ACLU NorCal and SoCal's goals of ensuring a fair and accessible judicial system because it allows individuals and organizations to access the judicial system when they have a property or transactional interest in the action. *See Cnty. Of San Bernardino v. Harsh Cal. Corp.*, 52 Cal. 2d 341, 346 (1959); *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 381 (1987) ("The intervenor of right has an interest in the litigation that it cannot fully protect without joining the litigation.") (J. Brennan, concurring).

If the Court of Appeal's opinion in *Friends* remains published, its flawed and overly stringent requirements for intervention by right could be applied in subsequent cases to bar public interest groups, like ACLU NorCal and SoCal, from having a seat at the table in cases that directly impact their interests.

REASONS THE *FRIENDS OF OCEANO DUNES* DECISION SHOULD BE DEPUBLISHED

ACLU NorCal and SoCal are deeply concerned about the Court of Appeal's ruling in *Friends* because the decision announces a new and highly restrictive test for intervention by right that is based on a cramped understanding of a party's "interest" that will prevent public interest groups from participating in lawsuits that can have devastating consequences for matters that are central to their mission, as long as one of the original parties wants the same general litigation outcome when the case is filed.

We agree with the arguments for depublication expressed in the request for depublication by the UCI Law Clinics Environmental Law Clinic, dated June 21, 2023 ("UCI Letter"). We write separately to emphasize the Court of Appeal's misreading of relevant federal case law, and the consequences of that misreading for intervention by public interest groups in cases where a government entity might momentarily appear to share their litigation objectives.

THE COURT OF APPEAL'S DECISION MISCONSTRUES AND IS INCONSISTENT WITH FEDERAL PRECEDENT

The Second District was correct in taking "'guidance from federal law' in evaluating whether" a party meets the criteria for mandatory intervention. *Friends of Oceano Dunes v. California Coastal Comm'n*, 90 Cal. App. 5th 836, 842 (2023), reh'g denied (May 9, 2023) (quoting *Edwards v. Heartland Payment Systems, Inc.*, 29 Cal.App.5th 725, 732 (2018); *see also Carlsbad Police Officers Ass'n*, 49 Cal. App. 5th at 151 ("Statutory language allowing intervention of right was added to section 387 in 1977 and is in substance an exact counterpart to the parallel federal rule. It follows that the Legislature must have intended that the two mandatory intervention statutes should have the same meaning, and we may look to authorities construing the parallel federal rule for guidance.") (internal quotation marks and citations omitted). Guidance from federal case law is only helpful, however, to the extent that case law is accurately represented. That is not the case with the Court of Appeal's discussion of relevant precedent.

Most importantly, the *Friends* decision cites *Callahan v. Brookdale Senior Living Communities, Inc.*, 42 F.4th 1013, 1021 (9th Cir. 2022) for the proposition that a prospective intervenor has identical interests to a party's interest "where party and nonparty seek the same litigation outcome." *Friends*, 90 Cal. App. 5th at 843. This understanding of *Callahan* provides the basis for the Court of Appeal's determination that the community stakeholders in this matter (the Northern Chumash Tribal Council, Oceano Beach Community Association, and Center for Biological Diversity) ("Appellants") had an interest that was "identical to that of the State defendants." *Id.* This determination in turn led the court to hold that Appellants were "required to make a compelling showing that the State defendants' representation will be inadequate." *Id.* The *Callahan* court's discussion of identical interests was, however, limited to the facts of that case, and the court did not hold that a shared desire for the same litigation outcome would always, or even generally, determine that a party and potential intervenor had identical interests.

The plaintiff in *Callahan* brought an action against a senior living community, which was her former employer, "pursuant to the California Private Attorneys General Act ('PAGA'), Cal. Lab. Code sections 2698–2699.5, which allows aggrieved employees to recover civil penalties for Labor Code violations on behalf of themselves, the state, or other current or former employees." *Callahan*, 42 F.4th at 1017. The plaintiff ultimately settled that case. The prospective intervenor had an overlapping PAGA case against the same employer, and was dissatisfied with the settlement, which impacted her because "an objector to a PAGA settlement who was not a party to the underlying litigation may not appeal the approval of the settlement." *Id.* at 1019. The only point of disagreement between the plaintiff and the prospective intervenor had to do with the settlement amount – the prospective intervenor thought that it was too small. *Id.* On these facts, the court concluded that the plaintiff and the prospective intervenor had "the same interest in this litigation: to obtain civil penalties on behalf of the [Californian Labor & Workforce Development Agency] under PAGA." *Id.* at 1021. The court determined that the plaintiff and prospective intervenor had identical interests not just because they both wanted a PAGA payout, but because that was the *only* interest either of them asserted.

Thus, the *Callahan* court did not create a general rule reducing the "identical interests" inquiry to a question about whether a prospective intervenor and party wanted the same litigation outcome. *Callahan* just stands for the principle that a party and prospective intervenor have identical interests when they assert no interests *other* than wanting the same litigation outcome. That conclusion has no bearing in *Friends*, where Appellants have asserted a host of interests not shared by the state Defendants, going well beyond a particular litigation outcome (including, for example, a history connecting them with the area "since time immemorial," threats to Chumash culture that "is intimately tied to the Dunes' ecology, including the education and nourishment of their children and ceremonies in remembrance of their dead in the Dunes," and the need to provide stewardship of the Dunes and its wildlife). UCI Letter at 3. The Court of Appeal's decision narrows a prospective intervenor's legally cognizable interests so as to foreclose consideration of any of any of these broader issues. The result in *Friends* was that none of the parties involved in the case could be counted upon to address the concerns that were central to Appellants' missions and interests. If allowed to stand, the decision will make it far more difficult for public interest groups to intervene to address similar concerns in future cases. So long as the prospective intervenor and a party share a desired litigation outcome, courts will examine the right to intervene with blinders on, refusing to consider the full range of interests that cause public interest organizations to seek leave to intervene in ongoing cases. The decision

will therefore ensure that no one involved in the litigation can be counted upon to defend these interests. *Callahan* provides no basis for this constricted vision, which is contrary to the legislative intent in enacting CCP section 387. *See* UCI Letter at 6¹.

**GOVERNMENT AGENCIES CANNOT BE COUNTED UPON TO REPRESENT THE
SAME SET OF INTERESTS THROUGHOUT THE DURATION OF AN ACTION**

The Court of Appeal's determination that a party and a prospective intervenor have identical interests so long as they seek the same litigation outcome is particularly problematic where, as here, the party that allegedly shares the same interest with the prospective intervenor is a government agency, because government agencies can, and have been known to, change their litigation positions over time. The issue is not only that government entity must balance competing interests different from those of a prospective intervenor at the outset of a case, but also that the government's balancing act may shift during the course of litigation. Because government entities are susceptible to shifting political winds, courts "have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors." *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 314 (D.C. Cir. 2015) (quoting *Fund For Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003)).

Recent history provides ample illustration of the principle that government entities may be fickle allies in public interest litigation. In a 2017 case about mandatory arbitration agreements, Acting Solicitor General Jeffrey B. Wall submitted a brief refuting the position taken by the Obama Administration in the same case, informing the Court that "[a]fter the change in administration, the Office reconsidered the issue and has reached the opposite conclusion." Brief for the United States as Amicus Curiae Supporting Petitioners in Nos. 16-285 and 16-300 and Supporting Respondents in No. 16-307 at 13, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (Nos. 16-285, 16-300, and 16-307), 2017 WL 2665007 at 13. The Trump Administration also reversed the litigation position of the Obama Administration in a major voting rights case, a case about whether public-sector-union agency fees violated the First Amendment rights of objecting nonunion members, and a case about the constitutionality of a

¹ By creating a more stringent standard for intervention by right, the Court of Appeal's decision also violates the principle that the inadequate representation requirement "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 (1972). In *Trbovich*, a union member wanted to intervene in a case brought by the Secretary of Labor to set aside a union election. Even though the union member and Secretary of Labor shared an interest in the litigation outcome, and the union member made the same claims of an illegal election that were presented in the Secretary's complaint, the Court determined that they had different interests, because the Secretary was charged with both enforcing union members' rights, and with protecting the "vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Id.* at 539. The Court thus rejected the Court of Appeal's position that the identical interests inquiry ends if the nonparty and party want the same litigation outcome. The Supreme Court has recently reaffirmed this point, emphasizing that the mandatory intervention rule presents "proposed intervenors with only a minimal challenge," and noting that government entities often have to "bear in mind broader public-policy implications" and may therefore not share "identical" interest with proposed intervenors. *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2203 (2022).

method of appointing Administrative Law Judges.² Not to be outdone, the Biden administration reversed Trump Administration positions in cases about the Affordable Care Act, union organizing, voting rights, a donor-disclosure law, and sentence reductions in the First Step Act, all in just the first two months of the administration.³

These cases make clear that, even if a public interest organization and a government party happen to seek the same litigation outcome at the moment the organization attempts to intervene in a case, there is no guarantee they will continue to share that desired outcome, or any other interests, as the case progresses. In cases where potential intervenors are shut out of litigation because government entities momentarily shared their litigation objectives but then change their position, it may be that no one will be left to “protect the interests of those who may be affected by the judgment.” *Cnty. Of San Bernardino*, 52 Cal. 2d 341, 346 (1959). This is contrary to the “purposes of intervention.” *Id.*

CONCLUSION

Based on the foregoing, ACLU NorCal and SoCal submit this amicus letter in support of the request to depublish the *Friends* Opinion.

Sincerely,



Jonathan Markovitz
jmarkovitz@aclusocal.org
Free Expression and Access to Government Staff Attorney
ACLU Foundation of Southern California



Angélica Salceda
asalceda@aclunc.org
Democracy and Civic Engagement Director
ACLU Foundation of Northern California

² See Michael R. Dreeben, *Stare Decisis in the Office of the Solicitor General*, 130 Yale L.J. Forum 541, 553 (2021) (discussing *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018); *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), and *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018)).

³ Debra Cassens Weiss, *Biden DOJ Outpaces Trump DOJ for Reversing US Position in Pending Supreme Court Cases*, ABA Journal, March 18, 2021, <https://www.abajournal.com/news/article/justice-department-outpaces-trump-doj-for-reversing-us-position-in-pending-supreme-court-cases>.

PROOF OF SERVICE

I, Brandee Calagui, declare that I am over the age of eighteen and not a party to the above action. My business address is 39 Drumm Street, San Francisco, CA 94111. My electronic service address is bcalagui@aclunc.org. On June 30, 2023, I served the attached,

Amici Curiae Letter in Support of Request for Depublication
Friends of Oceano Dunes v. California Coastal Commission
90 Cal. App. 5th 836 (2023), Second District Court of Appeal No. B320491

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused to be transmitted to the following case participants a true electronic copy of the document via this Court's TrueFiling system:

William J. White
Matthew Zinn
SHUTE, MIHALY & WEINBERGER
white@smwlaw.com
zinn@smwlaw.com
Attorneys for California Coastal Commission and John Ainsworth, Executive Director of the California Coastal Commission

Deborah A. Sivas
Matthew J. Sanders
Molly L. Melius
Stephanie L. Safdi
ENVIRONMENTAL LAW CLINIC MILLS LEGAL
CLINIC AT STANFORD LAW SCHOOL
dsivas@stanford.edu
matthewjsanders@stanford.edu
loughney@stanford.edu
Attorneys for California Coastal Commission

John J. Flynn III
Nossaman LLP
jflynn@nossaman.com
Attorney for CA Dept. of Parks and Recreation, et al.

Jon Ansolabehere
Chief Deputy Counsel
San Luis Obispo County
jansolabehere@co.slo.ca.us
Attorney for County of San Luis Obispo

Thomas D. Roth
rothlaw1@comcast.net
Attorney for Friends of Oceano Dunes, Inc.

David P. Hubbard
Kendall Teal
GATZKE, DILLON & BALANCE LLP
dhubbard@gdandb.com
kkraus@gdandb.com
Attorneys for Ecologic Partners, Inc.; and Specialty Equipment Market Association

BY MAIL: I mailed a copy of the document identified above by depositing the sealed envelope with the U.S. Postal Service, with the postage fully prepaid:

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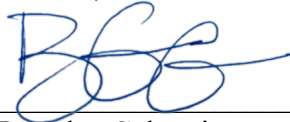
Superior Court of California, San Luis Obispo County

Hon. Tana L. Coates

1050 Monterey Street
San Luis Obispo, CA 93408

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 30, 2023 in San Francisco, CA.



Brandee Calagui
Declarant