

No. _____

In The
Supreme Court of the United States

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MARINE FORESTS SOCIETY and
RODOLPHE STREICHENBERGER,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

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**On Petition For A Writ Of Certiorari
To The California Supreme Court**

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PETITION FOR WRIT OF CERTIORARI

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RONALD A. ZUMBRUN
Counsel of Record for Petitioners
THE ZUMBRUN LAW FIRM
3800 Watt Avenue, Suite 101
Sacramento, California 95821
Telephone: (916) 486-5900
Facsimile: (916) 486-5959

QUESTION PRESENTED

May a state supreme court suddenly and arbitrarily change state law, unpredictable in terms of relevant precedents, so as to allow the state to defeat the constitutional protection against taking property without payment of just compensation and without due process of law or has a federal issue arisen making the exercise of this Court's review power necessary?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are the petitioners Marine Forests Society and its founder and president Rodolphe Streichenberger (Marine Forests) and the respondent California Coastal Commission (Coastal Commission or Commission).

Petitioner Marine Forests is a nonprofit organization whose purpose is to conduct experimental research on creating new or replacing lost marine habitat. The organization's objective is to discover economically viable techniques that facilitate the creation of large-scale marine forests where seaweed and shellfish can grow on sandy ocean bottoms and attract fish. App. A at 6.

The California Coastal Commission is a California state agency created by the California Coastal Act of 1976 (Coastal Act or Act). The Act is a very lengthy and comprehensive statutory scheme aimed at protecting the coastal zone. The Commission is the entity charged with the primary responsibility for the implementation of the provisions of the Coastal Act. App. A at 12.

CORPORATE DISCLOSURE STATEMENT

Petitioner Marine Forests Society is a nonprofit corporation. As a nonprofit corporation, the Marine Forests Society has no parent corporation or stock owned by any publicly held company.

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The June 23, 2005 opinion of the California Supreme Court was reported as *Marine Forests Society, et al. v. California Coastal Commission, et al.*, Case No. S113466. The entire opinion appears as Appendix A to this Petition.¹ It is also reported at *Marine Forests Society, et al. v. California Coastal Commission, et al.*, 36 Cal. 4th 1, 113 P.3d 1062 (2005). The opinion issued on December 30, 2002, by the California Court of Appeal, Third Appellate District, was reported as *Marine Forests Society, et al. v. California Coastal Commission, et al.*, Case No. C038753. The entire opinion appears as App. B to this Petition. The court of appeal's entire ruling on rehearing appears as App. C to this Petition. The Sacramento County Superior Court's decision in case number 00AS00567 issued on May 8, 2001, is included as Exhibit 1 to App. G.

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JURISDICTION

The California Supreme Court issued its opinion on June 23, 2005. App. A at 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

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CONSTITUTIONAL PROVISIONS AND STATUTE AT ISSUE

The Fifth Amendment to the United States Constitution provides:

¹ All further references to appendices hereto are shown as App.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor ***be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.***

(Emphasis added.)

The Fourteenth Amendment, § 1, to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; ***nor shall any State deprive any person of life, liberty, or property, without due process of law;*** nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added.)

The California Constitution Separation of Powers Clause provides: “The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.” Cal. Const. art. III, § 3.

In California, a quo warranto proceeding is governed by California Code of Civil Procedure § 803, which provides:

An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

(Emphasis added.)



STATEMENT OF THE CASE

A. Procedural Background

The California Coastal Commission is the “state coastal zone planning and management agency” with primary responsibility for implementing the California Coastal Act of 1976. It consists of 12 voting members, 4 appointed by the governor and 8 appointed by the legislature. Prior to 2003, all members served two-year terms at the pleasure of their appointing authorities. The Commission acts by a majority vote of its appointed members. App. B at 88.

On October 28, 1999, the Commission notified the Marine Forests Society that it intended to commence cease and desist proceedings regarding Marine Forests' experimental man-made reef on the ocean floor off of Newport Beach in Orange County, California. Marine Forests filed an action on January 31, 2000, seeking to enjoin the Commission from doing so. Marine Forests claimed, among other things, that the Commission did not have the authority to issue cease and desist orders or to grant or deny developmental permits because the appointment scheme of its voting members gives the legislative branch control over the Commission, thus impermissibly allowing the legislative branch to control the executive branch's responsibility to faithfully execute the laws. App. B at 88-89.

Based on the Undisputed Stipulated Facts for Summary Adjudication, App. D at 118, the trial court on May 8, 2001, held that the power of the Senate Committee on Rules and the Speaker of the Assembly to remove a majority of the Commission's voting members at the pleasure of those appointing authorities effectively makes the Commission a "legislative agency." Therefore, the court enjoined the Commission "as a legislative body . . . from exceeding its jurisdiction and violating the Separation of Powers Clause of the California Constitution [Cal. Const. art. III, § 3] which precludes it from granting, denying or conditioning permits or [from] issuing and hearing cease and desist orders." The Commission appealed. App. B at 93-94.

On appeal, the California Court of Appeal, Third Appellate District, concluded on December 30, 2002, that the Commission's interpretation and implementation of the California Coastal Act of 1976 is an executive function,

and that the appointment structure giving the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Commission's voting members, but also to remove them at will contravenes the separation of powers clause of California's Constitution. The flaw was that the unfettered power to remove the majority of the Commission's voting members, and to replace them with others if they act in a manner disfavored by the Senate Committee on Rules and the Speaker of the Assembly, makes those Commission members subservient to the Legislature. The appellate court found that this unrestrained power to replace a majority of the Commission's voting members, and the presumed desire of those members to avoid being removed from their positions, allows the legislative branch not only to make the law but also to control the Commission's execution of the law. App. B at 89-90. As a legislative body, the Commission would be limited to rule making and setting policy pursuant to the Coastal Act.

In affirming the judgment, the court of appeal emphasized that Marine Forests had made a timely separation of powers objection and pursued its remedies in a timely manner. The court expressly did not address the rights and interests of other parties to prior actions of the Commission. App. B at 90.

Following the court of appeal's decision, the California Legislature amended the statute by changing the two-year term of legislatively appointed commissioners to four years and eliminating the legislature's power to remove commissioners "at will." However, it left the legislature free rein to appoint two-thirds of the commissioners and remove or reappoint them at the end of their four-year terms. The

statute, Assembly Bill 1X, became effective on May 20, 2003. App. A at 2-3.

On April 9, 2003, the California Supreme Court granted review and expanded the issues to include the constitutionality of the “corrective” legislation, the retroactive implications, and the appropriate remedy. App. E at 131. These issues did not affect Marine Forests, which had filed a timely action under the prior law in existence since 1976. App. B at 90.

On June 23, 2005, the California Supreme Court issued its opinion, finding that the corrective legislation was constitutional and that the Coastal Commission’s structure beginning May 20, 2003, was valid and did not violate California’s separation of powers clause. App. A.

However, as to the *Marine Forests* case, in which a timely separation of powers challenge to the Commission’s composition had been raised (App. B at 90) and remained pending before the courts, the court concluded:

[T]here is no need to determine definitively the validity of the earlier statutory provisions in order to clarify the status of the numerous actions that were taken by the Commission at a time when its members were selected and served pursuant to the provisions of those statutes. As we shall explain, even if we were to assume (as *Marine Forests* contends) that the prior version of the statutes violated the separation of powers clause, the past actions of the Commission could not properly be set aside on that ground at this time.

App. A at 68.

The court further concluded:

[U]nder the “de facto officer” doctrine prior actions of the Commission cannot be set aside on the ground that the appointment of the commissioners who participated in the decision may be vulnerable to constitutional challenge. . . . The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it.

App. A at 69.

Marine Forests filed a timely action (App. B at 90) and challenged neither the appointment power of the legislature nor any individual commissioner’s title to office. *See infra* Section II. Rather, Marine Forests challenged the Commission’s exercise of executive and judicial branch functions so long as two-thirds of the Commission were appointed by the legislative branch and served at its will. This separation of powers challenge was directed at the Commission’s exercise of certain powers and did not relate to the legislature’s ability to establish the appointment process. *See infra* Section II. The court’s rationale deprived Marine Forests of due process of law and was unprecedented under California law, the laws of every other state, as well as federal law. *See infra* Section III.

B. Factual Background

After incorporating in 1986, Marine Forests planted its first experimental marine forest on a sandy plain approximately 300 yards offshore of the Balboa Peninsula

in Newport Beach, California.² This project was approved and permitted for Marine Forests by the City of Newport Beach, the trustee of the submerged lands where the project took place. It also was approved by the California Department of Fish and Game and the California Integrated Waste Management Board. Marine Forests did not seek permission for its activities from the California Coastal Commission. App. A at 6.

In June 1993, the staff of the Coastal Commission informed Marine Forests that it was required to apply to the Commission for a permit to conduct its activities on the submerged lands of the City of Newport Beach. In 1995, Marine Forests applied for an “after-the-fact” permit. In April 1997, the Commission denied Marine Forests’ application for the permit and thereafter directed its staff to commence enforcement proceedings against Marine Forests and compel it to cease and desist performing the contested operations. In 1999, the Commission’s executive director issued a “Notice of Intent to Commence Cease and Desist Order Proceedings” against Marine Forests. App. A at 6-7.

In response to the issuance of the notice of intent to commence cease and desist proceedings, Marine Forests filed this proceeding in superior court for ***declaratory and injunctive relief***, seeking to enjoin the Commission from pursuing enforcement proceedings against it. The

² A 10-minute videotape of this under sea project is contained in Exhibit 1 to the Declaration of Rodolphe Streichenberger in the Joint Appendix in Lieu of Clerk’s Transcript, Bates No. 00375, filed on December 14, 2001. This video properly portrays Marine Forests’ project and its property interests affected by the California Supreme Court’s decision.

complaint filed by Marine Forests maintained, in its initial cause of action, that the Commission lacked authority to pursue enforcement proceedings. Marine Forests asserted that, because a majority of the voting members of the Commission were appointed by the Senate Rules Committee and the Speaker of the Assembly and served at the will of their appointing authority, the Coastal Commission must be considered a “legislative body” for purposes of the separation of powers clause of the California Constitution. Therefore, the Commission lacked the authority either to grant, deny, or condition a permit or to conduct a hearing and issue a cease and desist order. After the filing of the complaint, both parties moved for summary adjudication on the separation of powers cause of action, App. A at 7, based on undisputed stipulated facts filed on February 15, 2001. App. D at 118.

To force Marine Forests to remove its project will not only destroy a marine habitat that required years to establish, but also will destroy the proofs of Marine Forests’ successful techniques. These techniques include the development of a marine habitat by the use of low-density artificial substrates on a sandy bottom. Marine Forests’ techniques are properties of value which took 19 years to invent and experiment. More years are needed to evaluate the aging phenomenon of the unique artificial substrates.



REASONS FOR GRANTING THE PETITION**I. THE CALIFORNIA SUPREME COURT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS THAT THE EXERCISE OF THIS COURT'S REVIEW POWER IS NECESSARY**

A state supreme court cannot suddenly change state law, unpredictable in terms of relevant precedents, so as to allow a state agency to take private property without payment of just compensation and without due process of law. Here, the state is being allowed to destroy Marine Forests Society's marine habitat without paying just compensation. *See supra* last paragraph of B, Factual Background. The California Supreme Court's action raises a federal question necessary for this Court to review. This Court stated in *Bonelli Cattle Company v. State of Arizona*, 414 U.S. 313, 331, 94 S. Ct. 517, 528-529 (1973):

As Mr. Justice Stewart warned in *Hughes v. Washington*, 389 U.S., at 298, 88 S.Ct., at 443 (concurring opinion): "Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so . . . (T)he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate. . . ."

Justice Stewart further stated in *Hughes v. State of Washington*, 389 U.S. 290, 296-297, 88 S. Ct. 438, 442 (1967):

To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

In *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S. Ct. 1332, 1335-1336 (1994), the U.S. Supreme Court denied the petition for writ of certiorari submitted by a group of Oregon property owners. Justice Scalia, with whom Justice O'Connor joined, wrote a five-page dissent to the denial stating:

“In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded.” . . .

. . . petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.

I would grant the petition for certiorari with regard to the due process claim.

A federal court, even this Court, must be especially hesitant to declare that a state judicial decree, defining state law, violates the Constitution. Yet, the Court has long ago settled that state judicial action is subject to constitutional scrutiny. *See, e.g., Ex Parte Virginia*, 100 U.S. 339, 25 L. Ed. 676 (1879); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976). *See also Pulliam v. Allen*, 466 U.S. 522, 536-545, 104 S. Ct. 1970, 1976-1983 (1984). In a variety of contexts, moreover, the decision of a state court has been reviewed by this Court to determine whether it has made such an arbitrary or unpredictable declaration of local law as to deny due process or otherwise deprive the petitioner of a federal right. *See, e.g., Ward v. Board of County Commissioners of Love County*, 253 U.S. 17, 22, 24, 40 S. Ct. 419, 421 (1920); *Georgia Railway & Power Co. v. Town of Decatur*, 262 U.S. 432, 438, 43 S. Ct. 613, 615-616 (1923); *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 98-99, 58 S. Ct. 443, 445 (1938); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43, 64 S. Ct. 384, 388 (1944); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-458, 78 S. Ct. 1163, 1169-1170 (1958); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 293-302, 84 S. Ct. 1302, 1306-1311 (1964); *Bowie v. City of Columbia*, 378 U.S. 347, 355-362, 84 S. Ct. 1697, 1703-1707 (1964). Indeed, in *Muhlker v. New York & Harlem Railroad*, 197 U.S. 544, 570, 25 S. Ct. 522, 528 (1905), the Court struck down a state court judgment expressly on the ground that it effected an uncompensated taking of property. *See also Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88, 43 S. Ct. 60, 64 (1922) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003,

1030, 112 S. Ct. 2886, 2901 (1992). For a pertinent historical analysis see Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 379 Utah L. Rev. 423-438 (2001).

Of particular note is the conclusion in *Hughes v. State of Washington*, 389 U.S. at 297, that “whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.”

Here, the Coastal Commission insists on eliminating the environmentally significant efforts of a group that has dedicated its life to bettering marine habitat. In fact, the Marine Forests Society recently received from the 2004 Governor’s Environmental and Economic Leadership a certificate of recognition for “meritorious contributions to environmental protection and resource conservation in the State of California.” App. F at 133.

As a result of the Coastal Commission’s unlawful efforts, the Commission will prevent Marine Forests from continuing with its nearly 19-year-old project, which now is more than a mere experiment. It is a mature marine habitat. In fact, the Commission is attempting to direct that the entire Marine Forests’ project be removed from Newport Harbor. App. A at 6-7.

If the California Supreme Court’s decision remains standing, that court will have allowed a state agency to take Marine Forests’ project without just compensation³ or

³ This would qualify as “categorical takings” under *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1027-1029, 112 S. Ct. at 2899-2900.

due process of law. The California Supreme Court denied Marine Forests due process of law by suddenly, arbitrarily and pretextually changing state law. This ruling was entirely unpredictable in terms of relevant precedents. *Hughes*, 389 U.S. at 296-97, 88 S. Ct. at 442.

II. THE DE FACTO OFFICER DOCTRINE DOES NOT APPLY TO MARINE FORESTS' SEPARATION OF POWERS ACTION

The California Supreme Court erred by arbitrarily applying a doctrine in the *Marine Forests* decision that had been previously applied only in the case of a defect in the appointment of a public official. *See infra* Section IV, A. Instead, the doctrine was applied here, where there was no issue of a defect in office and no challenge directed to the appointment process of the commissioners. The court erred in applying this doctrine to block a valid separation of powers challenge to the exercise of certain powers by the lawful agency and its lawful commission. *See infra* Section IV, A. Marine Forests did not seek or obtain the elimination of the agency or any of its commissioners. DVD⁴ at 39:16. As stated by Marine Forests Society during oral argument, “We are not challenging the appointments power exercised in this situation; we’re challenging the separation of powers which is a totally different thing.” DVD at 36:33. “We are not relying on federal law regarding

⁴ The subject oral argument on April 6, 2005, was televised and a digital video disk (DVD) of the proceedings was made available. The DVD has a running time of the argument shown on the side. Pending the availability of a transcript, the petitioners will refer to the timed references which can later be compared to the transcript. The oral argument can be seen on the archives for April 6, 2005, at www.calchannel.com.

appointments.” DVD at 37:01. “We are not saying the Commission goes out of existence, we are not arguing that. We are not arguing that the commissioners haven’t been appointed properly, because they have.” DVD at 39:16. “We are not challenging their exercise of the appointments power.” DVD at 54:04.

The full extent of the application by the court of the de facto officer doctrine to Marine Forests’ separation of powers challenge was not apparent until the subject opinion was issued. The court never addressed this issue to Marine Forests during oral argument.

Both the quo warranto and de facto officer doctrines were not at issue nor were they raised by the parties before the trial court or the court of appeal. App. B and G (Exhibit 1), Respondents’ June 16, 2003 Answer Brief on the Merits at page 34. They were first addressed by the Coastal Commission before the California Supreme Court in its Petitioner’s Brief on the Merits beginning at page 48. Marine Forests responded on June 16, 2003, beginning at page 34 of its Answer Brief on the Merits. *See also* Marine Forests’ Plaintiff’s and Respondent’s Supplemental Reply Brief at pages 4-10 filed on January 24, 2005.

III. THERE IS NO FEDERAL OR STATE PRECEDENT FOR THE CALIFORNIA SUPREME COURT’S RULING

Marine Forests is unaware of any state or federal court’s use of the de facto officer doctrine in the absence of a defect in an officer’s *title* to office or to enjoin an officer *de jure* from exercising powers beyond his constitutional limits. While the California Supreme Court used this concept because it was concerned about the number of

administrative rulings that might potentially be affected, App. A at 66-67, it failed to appreciate that its ruling already had barred challenges where the statute of limitations had run or res judicata principles were applicable. App. A at 68-69. These prohibitions are not applicable to Marine Forests, as its action was timely. App. B at 90. In fact, the Coastal Commission admits that there are only about 23 cases that raised the separation of powers issue after Marine Forests had prevailed below. (Commission's February 10, 2003 Request for Judicial Notice, Exhibit A, Exhibits 1 and 2). It is unclear if these 23 cases were timely filed.

IV. THE CALIFORNIA SUPREME COURT'S SEPARATION OF POWERS CLAUSE RULINGS DO NOT APPLY TO THE MARINE FORESTS SOCIETY

The California Supreme Court set up additional hurdles attempting to block all separation of powers claims against the Coastal Commission. Like the de facto officer doctrine, none of these apply to Marine Forests. This is further evidence of the pretextual nature of the California Supreme Court's decision.

A. The Separate Proceeding Requirement Is Not Applicable

In the California Supreme Court's decision, App. A at 70, the court suggests that a separation of powers challenge must be raised and resolved in a separate proceeding. The decisions cited by the court are founded in the application of quo warranto reasoning. The Commission tried to argue that a quo warranto action was a required

condition precedent for anyone other than Marine Forests to bring a separation of powers challenge such as was done in the present case. Commission's May 9, 2003 Petitioner's Brief on the Merits beginning at page 50, *see also* footnote 5 *infra*.

In California, a quo warranto proceeding is governed by California Code of Civil Procedure § 803, which in part provides: "An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who . . . unlawfully holds or exercises any public office. . . ."

This statute is not applicable to Marine Forests as there was no challenge to the lawfulness of anyone holding any public office. Furthermore, the Commission expressly waived this issue as to the Marine Forests Society while under the California Supreme Court's review. Commission's May 9, 2003 Petitioner's Brief on the Merits beginning at page 50⁵; Marine Forests' June 16, 2003 Respondent's Answer Brief on the Merits beginning at page 34 and related Respondent's June 16, 2003 Request for Judicial Notice (rejected by California Supreme Court, App. A at 67, n.25).

⁵ In its Petitioner's Brief on the Merits before the California Supreme Court, the California attorney general on behalf of the Commission stated: "Although it would not serve judicial efficiency or the public interest to require that MFS now seek leave of the Attorney General, any remedy issued by the Court should be the same as if the action had been brought in quo warranto. The Court should also affirm that, absent waiver, quo warranto is the exclusive remedy for future challenges to any agency's composition." Petitioner's Brief on the Merits beginning at page 50.

In fact, Marine Forests did file two separate actions. The first was the subject case alleging a violation of the separation of powers clause. The second action was to invalidate the subsequent cease and desist order. Sacramento County Superior Court Action No. 00AS03293, App. G at 134 (the trial court opinion in the subject action No. 00AS00567 is included as Exhibit 1 to App. G at 136).

The subject of separate proceedings is most significant to this Petition. Despite the fact that the Commission waived this issue, the California Supreme Court addressed it in its June 23, 2005 decision. App. A at 70. It was never an issue before the trial court, court of appeal or California Supreme Court levels. ***It was not briefed by the parties and not raised by the Supreme Court or the parties at the April 6, 2005 oral argument.*** See *supra* n.5. As a result, there was no need for Marine Forests to raise the above defenses and Marine Forests was denied the opportunity to be heard on this matter.

B. The De Facto Officer Doctrine Only Applies to Otherwise Lawful Actions

The California Supreme Court's April 9, 2003 Order, App. E at 131, required Marine Forests to address the issues of retroactivity, the constitutionality of the February 20, 2003 California Legislature's corrective legislation, and remedies. None of these issues involved Marine Forests because it had filed a timely action prior to the effective date of the corrective legislation. App. B at 90. Instead, Marine Forests was forced to represent the interests of all California coastal property owners not currently before the court and who were not clients of Marine Forests' attorneys. In that capacity, the supreme

court placed emphasis on the rights of third parties rather than addressing the rights of Marine Forests, especially at oral argument. As a result, the court determined that those third parties had no rights and included Marine Forests in its analysis even though many of the main issues had never been presented nor did they apply. Even more detrimental to Marine Forests was the court's inadequate analysis of the separation of powers issue – the actual issue on appeal. Consequently, the court denied Marine Forests due process.

For example, the Court in its decision challenged Marine Forests' argument that the de facto officer doctrine should not apply to actions by the Coastal Commission when it is determined that the Commission also violated other constitutional rights of parties before the Commission. App. A at 74. The court cited *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). There, the Coastal Commission was demanding the dedication of private property to the state in return for granting permits. The United States Supreme Court held that this practice “was an out-and-out plan of extortion” and was unconstitutional. *Nollan*, 483 U.S. at 837, 107 S. Ct. at 3149.

The California Supreme Court responded by stating: “But Marine Forests fails to cite any California authority supporting the imposition of such a limitation on the de facto officer doctrine, a limitation that largely would eviscerate the doctrine and that finds no support in its underlying purpose.” App. A at 74.

The court then makes the contradictory statement: “Of course, if a past action of the Commission remains subject to judicial review and is vulnerable to challenge on

some other ground, the de facto officer doctrine will not provide a bar to such a challenge.” App. A at 74.

The court also improperly relies on this Court’s decision in *Buckley v. Valeo*, 424 U.S. 1, 142, 96 S. Ct. 612, 693 (1976). App. A at 73. In *Buckley*, the Federal Elections Commission, which administers federal election law, was found to violate the separation of powers doctrine because four of the six voting members of the commission were appointed by members of Congress. Their past actions were afforded de facto validity and Congress was allowed 30 days to reconstruct the Commission by law or adopt other valid enforcement mechanisms.

The difference in *Marine Forests* is that the Coastal Commission was not unlawful and neither were the commissioners. The trial court and court of appeal held that the Commission could continue to perform legislative acts but not judicial or executive acts unless the legislature corrected matters. As a legislative body, the Commission could continue to set statewide policy and make rules, but not implement them. This also would avoid the constitutional flaw of the Commission, which results in legislative interference with its implementation of the Coastal Act. *Marine Forests* contends that this legislative intrusion results in favoritism, lack of consistency, uncertainty and other such matters.

The remedy was well within the discretion of the trial court and the court of appeal as the Commission would remain in existence. If the legislature did not like this solution, it could pass corrective legislation, which in the court’s opinion, it had. In reality, who could the attorney general sue under quo warranto? It could not sue its

clients, the Coastal Commission and commissioners, because they all held lawful office.

C. While Injunctions Are Normally Prospective, the Prior Law Still Controls Former Unlawful Acts Under Marine Forests' Facts

In its decision, the California Supreme Court declares:

[T]he validity of the judgment must be determined on the basis of the current statutory provisions, rather than on the basis of the statutory provisions that were in effect at the time the injunction order was entered. . . .

. . .

Accordingly, in resolving this appeal from the trial court's judgment granting injunctive relief against the Coastal Commission, we must determine whether the injunction should be affirmed in light of the current statutory provisions. If the current statutory provisions are constitutional, the injunction prohibiting the Commission from granting, denying, or conditioning permits *in the future* (or from holding hearings on and determining cease and desist orders) cannot be upheld on appeal.

App. A at 18-20 (emphasis added).

Here, both the trial and appellate courts enjoined the Commission from performing executive and judicial branch functions. The California Supreme Court ruled that AB1X was constitutional and that the Commission's past adjudicatory and executive actions involving Marine Forests as to decisions rendered prior to the effective date of the new legislation were valid. "Retroactive application of a statute may be unconstitutional if it is an ex post facto law,

if it impairs the obligation of a contract ***or if it deprives a person of a substantive right without due process of law.***” *Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 962, 131 Cal. Rptr. 2d 303 (2003) (emphasis added); *see also In re Marriage of Buol*, 39 Cal. 3d 751, 756, 705 P.2d 354 (1985). Assuming *arguendo* that AB1X remedied the problems articulated by both the trial and appellate courts, the past cease and desist decision involved in this lawsuit which was made by the former unconstitutional agency remains invalid and unenforceable as to the Marine Forests Society. In fact, it is clear that the legislature did not intend retroactivity as there was no intent expressed to do so. A statute is normally presumed not to be retroactive. *Plotkin*, 106 Cal. App. 4th at 961-62, 131 Cal. Rptr. 2d 303.

Due process prohibits any application of the former unconstitutional agency’s actions such as the issuance of the cease and desist order. The new law cannot retroactively apply to adjudicatory actions of a former unconstitutional agency. The parties appearing before the old agency have not had a hearing before a constitutional body; therefore, the past decisions can have no effect. Those parties can be affected only by future agency actions taken by the newly constituted agency. This argument was presented in greater detail in Marine Forests’ January 14, 2005 Supplemental Letter Brief before the California Supreme Court beginning at page 1.

Based on the above, the additional barriers fail and do not moot out the Marine Forests’ separation of powers action. In view of the California court’s apparent disdain for the previous “at will” appointment scheme, App. A at 61 and 67, the court should have ruled on this issue and recognized that the prior injunction was effective during the time the old law was in effect. These are further

examples of the California Supreme Court abruptly changing the law without warning or precedential support.

D. The California Coastal Act Provides No Safeguards to Protect Against the Intrusion of the Legislative Branch of Government

Petitioners were able to establish the complete absence of safeguards to protect the executive branch's core functions from undue interference by the legislature, that is implementing the laws including the Coastal Act. The lower courts agreed. App. B at 101-104. The California Supreme Court's contrary conclusion on this subject further illustrates its pretextual approach. App. A at 62-63.

In fact, the Attorney General did not present argument on this issue until his last minute of rebuttal during oral argument before the California Supreme Court. DVD at 1:04:00.⁶ While the California Supreme Court ruled that

⁶ At the end of his rebuttal before the California Supreme Court, counsel for the Commission stated: "The Commissioners are independent. They don't have unfettered discretion to follow the whims of their appointing authority. They have a Coastal Act to follow. Their decisions have to be based on evidence. They have to be conducted at a public hearing. Findings have to be made. There has to be written findings. Those findings have to be supported by evidence and all that gets reviewed by the courts, and so we have – if they are going to do what they have been asked to do, what they have sworn to do, they are going to follow the law and they are going to disregard any perceived displeasure of their appointing authority. Even assuming they can devise in any case what their appointing authority wanted them to do. So, I think the court has a choice then, if you get to this removal issue, are we going to presume the best in the people that we have appointed to do the job or are we going to presume that they are going to disregard all these safeguards and act simply to please their appointing authority?"

there were plenty of safeguards, App. A at 62-63, the proffered safeguards were due process safeguards not separation of powers safeguards. See App. B at 101-104 and *O'Brien v. Jones*, 23 Cal. 4th 40, 54-56, 999 P.2d 95 (2000) for comparison to due process safeguards.

Thus, the California Supreme Court's pretextual approach failed to substantiate its conclusion regarding safeguards and further denied due process for Marine Forests.



CONCLUSION

The de facto officer doctrine has been limited under California law to defects in the title to office. In this separation of powers action, the California Supreme Court suddenly and arbitrarily changed California law to apply this doctrine to a separation of powers challenge. This was unpredictable in terms of relevant precedents and is inconsistent with the law of all other states and the federal government. As a result, the Marine Forests Society is being deprived of its property interests in its marine habitat that its 19-year effort has established. Because of the California Supreme Court's decision, the state will accomplish this taking without payment of just compensation and without due process of law. This is such a departure from the accepted and usual course of judicial proceedings that a federal issue has arisen and the exercise of this Court's review power is necessary.

The importance of California's and our country's separation of powers doctrines emanated from the efforts of our founding fathers and was thoroughly addressed in the federalist papers. *O'Brien v. Jones*, 23 Cal. 4th at 65-66, 999

P.2d 95. The California Supreme Court has now made it impractical if not impossible in California to mount a separation of powers challenge as has been attempted by Marine Forests.

The Marine Forests Society has experienced extensive denials of due process and has been subjected to a judicial taking of its property. A state is precluded from taking private property without due process and the payment of just compensation – the courts should not be the exception.

This deprivation of Marine Forests' constitutional rights includes the following:

1. The California Supreme Court has allowed a state agency to take the subject Marine Forests' property without just compensation or due process of law;
2. The concept that injunctive relief is prospective cannot apply to adjudicatory functions of a formerly unconstitutional agency action without denying due process of law.
3. The parties appearing before the old agency have not had a hearing before a constitutional body and therefore have been denied due process.
4. Marine Forests was denied a hearing before the trial court and court of appeal on the de facto officer and quo warranto doctrines as they were raised for the first time before the California Supreme Court. These issues were never raised or orally argued in the context of applying to Marine Forests, thus again denying due process.

5. Whether a state court has unpredictably changed state law to deny constitutional rights presents a federal question for the determination of this Court.
6. Petitioners have demonstrated that the basis for the California Supreme Court's decision and reasoning was pretextual raising a due process issue.
7. A further example of the pretextual approach by the California Supreme Court was the suggestion that there were plenty of separation of power safeguards present when there actually was a total absence of such safeguards as found by the lower courts.
8. The California Supreme Court erred by incorrectly applying the de facto officer doctrine which had previously been applied only where there was a defect in the appointment of a public official.
9. Due process of law was denied by the California Supreme Court in requiring two actions to be brought. This issue was waived by the attorney general and in fact, had been complied with. *See supra* n.25.
10. The failure to raise or address the separate proceeding issue at the trial and appellate levels, including oral argument, is a denial of due process. This subject first appeared in the June 23, 2005 decision of the California Supreme Court. App. A at 70.
11. There has been a denial of access to the courts caused by the California Supreme Court not reaching the issue of the constitutionality of

the structure of the Coastal Commission prior to May 20, 2003. That was the primary issue on appeal that involved the Marine Forests Society.

12. As a result of the California Supreme Court's decision, petitioners have been denied fundamental fairness and have been deprived of fundamental constitutional rights.

For the reasons set forth above, petitioners respectfully request that this Court grant the Petition for Writ of Certiorari and direct the California Supreme Court to address the issue of the constitutionality of the prior statutory scheme and, if found to be unconstitutional, grant declaratory or other appropriate relief or remand the case to a lower court.

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Respectfully submitted,

RONALD A. ZUMBRUN
Counsel of Record for Petitioners
THE ZUMBRUN LAW FIRM
3800 Watt Avenue, Suite 101
Sacramento, CA 95821
Telephone: (916) 486-5900
Facsimile: (916) 486-5959