IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C075954
(Consolidated with No. C075930)

MORNING STAR PACKING COMPANY, et al.,
Petitioners-Appellants,

v.

CALIFORNIA AIR RESOURCES BOARD, et al.,
Respondents-Appellees,

and

ENVIRONMENTAL DEFENSE FUND, et al.,
Intervenors and Respondents.

On Appeal from the Superior Court of Sacramento County
(Case No. 34-2013-80001464, Honorable Timothy M. Frawley, Judge)

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C075954 Consol. with C075930
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APPELLANT/PETITIONER: Morning Star Packing Company, et al. RESPONDENT/REAL PARTY IN INTEREST: California Air Resources Board, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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(1)	
(2)	
(3)	
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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 17, 2014

THEODORE HADZI-ANTICH
(TYPE OR PRINT NAME)

▶ 
(SIGNATURE OF PARTY OR ATTORNEY)

SHORT TITLE:	CASE NUMBER:
Morning Star Packing Co., et al. v. Cal. Air Resources Board, et al.	C075954 Consol. with C075930

ATTACHMENT *(Number):* 1

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Certificate of Interested Entities or Persons submitted on behalf of the following parties:

1. Morning Star Packing Company;
2. Dalton Trucking, Inc.;
3. California Construction Trucking Association;
4. Merit Oil Company;
5. Ron Cinquini Farming;
6. Construction Industry Air Quality Coalition;
7. Robinson Enterprises, Inc.
8. Loggers Association of Northern California, Inc.
9. Norman R. "Skip" Brown;
10. Joanne Brown;
11. Robert McClernon;
12. National Tax Limitation Committee

(If the item that this Attachment concerns is made under penalty of perjury, all statements in this Attachment are made under penalty of perjury.)

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INTRODUCTION

This appeal arises out of an effort by a state agency to collect billions of dollars of revenue from California enterprises in violation of the California Constitution and, in the alternative, without statutory authority. The Petitioners-Appellants (collectively, "Petitioners"), ask this Court to reverse the decision of the court below on legal grounds and to declare invalid, enjoin, and order the Respondents-Appellees (collectively, "CARB"), to rescind and refrain from enforcing a regulation governing emissions of carbon dioxide and related gases ("greenhouse gases").

The regulation at issue, Cap of Greenhouse Gas Emissions and Market-Based Compliance Mechanisms, 17 C.C.R. §§ 95801-96023 ("Cap and Trade Regulation"), was promulgated by CARB under the California Global Warming Solutions Act of 2006, Health & Safety Code § 38500, *et seq.* ("A.B. 32"), which mandates that California Covered Entities reduce greenhouse gas emissions to 1990 levels by the year 2020, under a statewide descending "cap" on such emissions. The specific portions of the Cap and Trade Regulation for which relief is sought are set forth in 17 C.C.R. §§ 95830-95834, 95870, and 95910-95914 (the "Auction Provisions"). On cross motions for summary judgment, the court below found that the Auction Provisions did not violate the California Constitution and were authorized by A.B. 32 (JA1595-1616). This appeal challenges that decision.

STATEMENT OF THE CASE

On April 16, 2013, Petitioners filed a Verified Petition for Writ of Mandate and Complaint for Declaratory Relief against CARB in the Superior Court of California for the County of Sacramento, asking the court to declare invalid, enjoin, and order CARB to rescind the Auction Provisions of the Cap and Trade Regulation. (JA0549).

The case was assigned Number 34-2013-80001464 by the Superior Court. On April 17, 2013, the Petitioners filed a Notice of Related Case, notifying the trial court and the parties that Case No. 34-2012-80001313, pending in the same court, was related to the instant case. (JA0575). On April 24, 2014, the trial court ordered that the two cases be designated as related. (JA0579).

On May 14, 2013, Environmental Defense Fund and Natural Resources Defense Council (the "Environmental Advocacy Group Intervenors"), were granted intervenor status as Respondents-Defendants (JA0597), and they filed their Complaint in Intervention on June 12, 2013 (JA0898).

After the briefing, on November 12, 2013, the trial court issued an Order After Hearing, ruling in favor of CARB on all issues in both cases. (JA-1566). Specifically, the trial court held that (1) the Auction Provisions, and therefore A.B. 32, did not violate California Constitution Article XIII A, Section 3 **(Proposition 13)**, (2) Neither the Auction Provisions nor four bills

enacted in 2012 violated California Constitution Article XIII A, Section 3 (**Proposition 26**), and (3) the Auction Provisions were authorized by A.B. 32. On December 20, 2013, the trial court issued its Judgment spelling (JA1618). Notice of Entry of Judgment was filed on January 9, 2014 (JA1681).

Notice of Appeal was timely filed in the trial court on February 28, 2014 (JA1742). The Petitioners filled their Notice Designating Record on Appeal on April 11, 2014 (JA1780).

On May 5, 2014, the trial spelling court filed its Clerk's Designation of Record on Appeal, attaching the original signed Reporter's Transcript of the hearing held on August 28, 2013, which was received by this Court on May 8, 2014. The Clerk's Designation stated that, although the Petitioners in the instant case requested the administrative record, that record was filed in the related case but not in the instant case; to avoid duplication. The parties have stipulated that the administrative record in the related case will serve as the record in that case and the instant case (JA1956-1957). On July 15, 2014, this Court approved a request by the parties to consolidate the instant appeal (CO75954), with the appeal in the related case (CO75930). JA1958.

STATEMENT OF APPEALABILITY

This appeal is from a final judgment after court trial on the Verified Petition for Writ of Mandate and Complaint for Declaratory Relief and is authorized by Code of Civil Procedure section 904.1, subdivision (a)(4).

STATEMENT OF FACTS

Under the Cap and Trade Regulation, Covered Entities, *i.e.*, those who are subject to the emissions limitations, may not emit greenhouse gases without possessing emissions allowances created by CARB, which distributes the allowances free of charge to certain Covered Entities and sells the remainder at auction, with the proceeds of auction sales to be used by California for purposes that are not specifically identified in either A.B. 32 or the Cap and Trade Regulation (JA-0693).[1] Annual revenues to be generated by CARB at such auctions have been estimated at between $1 billion and $14 billion, with total estimated revenues ranging from $7 billion to $75 billion, to be generated over a seven-year period from 2013-2020 (JA0697).

As of the date of the filing of Petitioners' Opening Brief in the lower court, CARB had held three auctions at which it had collected approximately $796 million in revenues, and CARB plans to hold auctions every three months for the next several years, as the state emissions cap decreases over time. (JA0721-0722, 0725).

At the end of each compliance period, Covered Entities must surrender their emission allowances and obtain new ones for the next compliance period. A declining emissions cap requires that CARB create fewer emissions

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[1] *See* Petitioners' Request for Judicial Notice, Appendix of Exhibits, and Declaration of Ralph Kasarda, filed in the lower court (JA0677).

allowances for each succeeding compliance period (JA0695, 0743-0745). Accordingly, the price of allowances sold at auction will increase over time, as the supply of allowances decreases. (JA0738).

No provision in A.B. 32 specifically directs CARB to collect revenues pursuant to an auction of greenhouse gas emission allowances, and A.B. 32 is silent with regard to what, if anything, is to be done with any such revenues. In 2012, the California Legislature enacted four bills which together purport to allocate the revenues generated at CARB's auctions. First, Senate Bill 1018 ("S.B. 1018") provides that (1) "except for fines and penalties, all moneys collected by CARB from the auction or sale of allowances . . . shall be deposited in the [Greenhouse Gas Reduction] fund and [shall be] available for appropriation by the Legislature," Gov't Code § 16428.8(b), and (2) the State "Controller may use the moneys in the [Greenhouse Gas Reduction] fund for cash flow loans to the General Fund . . .." Gov't Code § 16428.8(d).

Second, Assembly Bill 1532 ("A.B. 1532"), provides that the uses of funds to be deposited in the Greenhouse Gas Reduction Fund may be determined after the revenues have been collected. Health & Safety Code §§ 39712(a)-(c), 39716(a)-(c), 39718(a)-(b).

Third, Senate Bill 535 ("S.B. 535") mandates that a minimum of 25% of CARB's auction revenues be spent for the benefit of certain "disadvantaged communities," and that a minimum of 10% of the available moneys in the

Greenhouse Gas Reduction Fund be allocated to projects located within such communities. Health & Safety Code §§ 39713(a)-(b).

Fourth, Assembly Bill 1464 ("A.B. 1464") provides that notwithstanding any other provision of law, the Director of Finance may allocate or "otherwise use" an amount of "at least" $500 million from moneys derived from the sale of greenhouse gas emission allowances deposited in the Greenhouse Gas Reduction Fund and make commensurate reductions to General Fund expenditure authority. 2012 Stats. Ch. 21 § 15.11(a).

In 2014, the Legislature allocated certain moneys in the Greenhouse Gas Reduction Fund to various projects. Sixty percent of future auction proceeds are allocated to an amalgam of programs, including affordable housing, high-speed rail, and public transit. S.B. 852, 862 (June 20, 2014). The Petitioners hereby request that this Court take judicial notice of those 2014 enactments. *Dailey v. City of San Diego*, 223 Cal. App. 4th 237, 244 n.1 (2013) (Courts may take judicial notice of post-judgment legislative changes relevant to an appeal.)

STANDARD OF REVIEW

A trial court's denial of a petition for writ of mandate is reviewed *de novo* where the decision does not involve any disputed facts. *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1032 (2007). The facts in this case are undisputed. Whether the Auction Provisions are unconstitutional or

unauthorized by statute are legal questions with regard to which an appellate court does not defer to the trial court's decision. *Gilbert v. City of Sunnyvale*, 130 Cal. App. 4th 1264, 1275 (2005) ("In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment."). *See Reid v. Google, Inc.*, 50 Cal. 4th 512, 527 (2010) (*de novo* review for statutory construction issues); *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 836 (2001) (*de novo* review for construction of constitutional amendments adopted by voter initiative).

Differing specific *de novo* review standards apply, however, depending upon whether the issue is one constitutional or statutory construction. On the issue of whether a revenue-generating imposition or levy is an unconstitutional "tax" or an allowable "regulatory fee," the standard of review depends on whether the imposition is controlled by Proposition 26 or by Proposition 13. Cal. Const. art. XIII A, § 3. For impositions mandated *after* November 3, 2010, the effective date of Proposition 26, CARB bears the burden of proving by a preponderance of the evidence that the imposition is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity. Cal. Const., art. XIII A, § 3(d). On the other hand,

for impositions enacted *prior* to November 3, 2010, Proposition 13 applies. Under Proposition 13, the Petitioners are required to make a prima facie showing that the imposition is an unconstitutional tax. But once a prima facie showing is made, CARB bears the "burden of production and must show '(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.' " *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 436-37 (2011) (quoting *Sinclair Paint Company v. State Bd. Of Equalization*, 15 Cal. 4th 866, 878 (1997).

Finally, on the issue of whether an administrative agency exceeded its authority, this Court gives no deference to the agency's interpretation of the statute at issue. *See Cal. Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d. 1, 11-12 (1990) (government not entitled to deference if "the regulations transgress statutory power").

SUMMARY OF ARGUMENT

The revenues CARB has collected and intends to collect by auctioning emission allowances are unconstitutional, not authorized by statute, or both. They are illegal taxes in violation of California Constitution, Article XIII A, Section 3 (**Proposition 13**), because A.B. 32 was not enacted by at least a two-

thirds supermajority vote of the California Legislature. And the auction revenues cannot be characterized as valid regulatory fees under *Sinclair Paint* and its progeny because: (1) they are not limited to the reasonable costs of any regulatory program, (2) there is no reasonable relationship between the amounts bid at auction and the bidder's regulatory burdens or benefits, and (3) the Cap and Trade Regulation does not prohibit the revenue from being used for purposes that are unrelated to CARB's greenhouse gas emissions limitations program.

In the alternative, the Cap and Trade Regulation is ultra vires because A.B. 32 does not authorize CARB to generate billions of dollars of revenues for California by selling emission allowances at auction. If there is any ambiguity in A.B. 32's language regarding whether auctions are authorized, overwhelming evidence in the legislative history shows that the Legislature did not intend for CARB to generate billions from its implementation of A.B. 32.

Finally, if A.B. 32 does not authorize CARB to generate billions, then any effort by the Legislature to authorize the auctions after-the-fact in 2012, is unconstitutional because not one of the relevant 2012 legislative enactments was passed by at least a two-thirds supermajority of the Legislature. Cal. Const. art. XIII A, § 3 (**Proposition 26**). For the same reason, the relevant 2014 legislation cannot support the auctions.

ARGUMENT

I

THE REVENUE GENERATED BY THE AUCTION IS AN ILLEGAL TAX IN VIOLATION OF CALIFORNIA CONSTITUTION ARTICLE XIII A, SECTION 3 (PROPOSITION 13)

The People's Initiative to Limit Property Taxation, known as Proposition 13, amended the Constitution of California in 1978. Under Proposition 13, any legislation to increase state taxes "for the purpose of increasing revenues" must be passed by at least a two-thirds supermajority vote of the members of both houses of the Legislature. Cal. Const., art. XIII A, § 3. *See, Cal. Farm Bureau Fed'n*, 51 Cal. 4th 421 at 428.

A.B. 32 was not passed by two-thirds of the members of the Legislature and, therefore, it cannot be used to raise state taxes (JA0809-0810) (vote tally in Assembly and Senate). In construing Proposition 13, the California Supreme Court held in *Sinclair Paint* that if a revenue generating measure is a regulatory fee and not a tax, Proposition 13 does not require a supermajority vote. *See* 15 Cal. 4th at 876-78. The question in the instant case is whether CARB's revenue-generating auctions are unconstitutional taxes or valid regulatory fees.

A. The Revenues Generated by CARB's Auctions Are Unconstitutional Taxes Under Proposition 13 Because They Fail To Meet the Requirements of the California Supreme Court's *Sinclair Paint* Test

Under Proposition 13, any revenue generating measure related to a regulatory scheme is subject to a four-pronged test established in *Sinclair Paint* to determine whether it is a tax or a regulatory fee. Under the test, the following requirements all must be met:

(1) There must be "a causal connection or nexus between the product [or regulated activity] and its adverse effects," *Sinclair Paint*, 15 Cal. 4th at 878;

(2) The total amount of money raised by the program must be "limited to the reasonable costs of . . . [the] program," *id.*, as defined by "amounts necessary to carry out the regulation's purpose," *id.* at 876;

(3) The allocation of burdens among payors must reflect "a fair or reasonable relationship" between the charges allocated to a payor and "the payor's burdens on or benefits from the regulatory activity," *id.* at 878 (quoting *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal. App. 3d. 1132, 1146 (1988)); and

(4) The fees must not be used "for unrelated revenue purposes." *Id.*

The auctions under the Cap and Trade Regulation fail to meet the second, third, and fourth prongs of the *Sinclair Paint* test.

1. CARB's Auction Revenue Fails To Meet the Second Prong of the *Sinclair Paint* Test Because the Revenue Is Not Limited to the Reasonable Costs of the Regulatory Program

To constitute valid regulatory fees and not taxes, the revenues may not "exceed in amount the reasonable cost of providing the protective services for which [they were] charged," *Sinclair Paint*, 15 Cal. 4th at 876 (citing *Pennell v. City of San Jose*, 42 Cal. 3d. 365, 375 (1986)). For four reasons, CARB's auctions fail this prong of the *Sinclair Paint* test: (1) CARB cannot determine in advance of any auction the amount of revenues that will be generated, (2) CARB cannot provide any reasonable estimate of the regulatory costs because many of the specific programs to be funded by the auction revenues are either not identified or unauthorized, (3) there is no safeguard to authorize the lowering or reimbursement of auction payments if proceeds are found to exceed the cost of the regulatory program, and (4) the auction revenues are unnecessary to administer or implement the regulatory program. Each of these criteria is examined.

a. CARB Cannot Determine in Advance of Any Auction the Amount of Revenues That Will Be Generated

Each auction is conducted as a single round bidding process where "bids will be sealed," so that no bidder knows the amount of any other will bid, and CARB does not know in advance the amount of revenues that will be collected. 17 C.C.R. § 95911(a)(1)-(2). This makes it impossible for CARB

to determine whether auction revenues will be greater than, less than, or equal to the "reasonable costs" of the regulatory program. Auction revenues are a function of the "blind" bids made by bidders at each auction, which depends entirely on what individual bidders may be willing to bid at any particular time, based upon their own economic decisions. Rabo Decl. ¶¶ 2, 18 (JA0840,0842). Accordingly, the requisite alignment between the auction revenues and the "reasonable costs of providing" the regulatory service is missing. *Sinclair Paint*, 15 Cal. 4th at 876.

b. CARB Cannot Provide Any Reasonable Estimate of the Regulatory Costs Because Many of the Specific Programs To Be Funded by the Auction Revenues Are Either Not Identified or Unauthorized

Under *Sinclair Paint*, CARB must provide at least an estimate of the regulatory costs, yet none has been provided. "[T]o show a fee is a regulatory fee and not a special tax, the government should prove . . . the estimated costs of the service or regulatory activity." *Sinclair Paint*, 15 Cal. 4th at 878, (quoting *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal. App. 3d. at 1146). CARB's auctions fail to meet this requirement because CARB has made no findings in the Cap and Trade

Regulation or elsewhere[2], regarding the estimated costs of services or regulatory activities to be funded by auction revenue.

c. There Is No Safeguard To Authorize Reimbursement of Auction Payments If Proceeds Are Found To Exceed the Cost of the Regulatory Program

Regulatory safeguards are absent for ensuring that auction payments are reimbursed if auction revenue exceeds the cost of the regulatory program. The Cap and Trade Regulation does not provide for funds generated at auction to be returned to the successful auction bidders if it is determined, in retrospect, that they paid more than their *pro rata* share for the "service or regulatory activity." *Sinclair Paint*, 15 Cal 4th at 878. Accordingly, there is a built-in risk that bidders will pay more than is required to fund the regulatory program, something that is antithetical to *Sinclair Paint.*

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[2] California's recently issued "Cap-and-Trade Auction Proceeds Investment Plan: Fiscal Years 2013-14 through 2015-16" (the "Investment Plan") sets forth certain recommendations to the Legislature regarding "priority State investments to help achieve greenhouse gas reduction goals and yield valuable co-benefits," but the Investment Plan does not provide cost estimates of *actual* services or regulatory activity to be funded by auction revenues. Those depended entirely on future legislation. ("[I]nclusion of a recommended investment in this plan does not guarantee funding.") (JA0736). It is true that 2014 legislation allocates certain moneys in the Greenhouse Gas Reduction Fund to some specific projects, but several of them (e.g., affordable housing, high speed rail) have little if any relationship to compliance with A.B. 32's greenhouse gas emissions reduction goals and, therefore, do not provide funds for a relevant "government service or activity." 203 Cal. App. 3d. at 1146.

d. The Auction Revenues Are Unnecessary To Administer or Implement the Regulatory Program

CARB's costs of administering the A.B. 32 program are already funded under the Act's administrative fees provision, which authorizes CARB to promulgate regulations adopting "a schedule of fees to be paid by [regulated] sources of greenhouse gas emissions." Health & Safety Code § 38597. The, revenues must be used "for purposes of carrying out this division." *Id.* Thus, A.B. 32 section 38597 contemplates that the regulatory fees authorized therein *themselves* will pay for the costs associated with CARB's administration of A.B. 32. In fact, CARB has promulgated a detailed fee regulation implementing section 38597, the sole purpose which is to "collect fees to be used to carry out the California Global Warming Solutions Act of 2006, as provided in Health and Safety Code section 38597" (internal citations omitted). 17 C.C.R. § 95200. That fee regulation is separate from CARB's Cap and Trade Regulation. And the formula that must be used to calculate the amount of administrative fees provides explicitly for the full recovery of the total costs of implementing A.B. 32's regulatory program. "The Required Revenue [from the fee regulations] shall be the *total* amount of funds *necessary to recover the costs of implementation of A.B. 32 program expenditures for each fiscal year.*" 17 C.C.R. § 95203(a)(1). (Emphasis

added.) Accordingly, there is no need for proceeds from an auction to cover the "costs of implementation of A.B. 32's program." *Id.*

Indeed, the Cap and Trade Regulation states that "[t]he purpose of [the Cap and Trade Regulation] is to reduce emissions of greenhouse gases," 17 C.C.R. § 95801, while the administrative fee regulation states that the "total amount of funds necessary to recover the costs of implement[ing]" the Cap and Trade Regulation is provided by the administrative fee regulation. *See* 17 C.C.R. § 95203(a)(1). Applying the *Sinclair Paint* test, the "costs of the service or regulatory activity" implementing the Cap and Trade Regulation are fully recovered by CARB under the administrative fee regulation and, therefore, the auction revenues are not reasonably necessary to achieve the regulatory purpose, 15 Cal. 4th at 876.

Conceivably, one may posit that CARB's administrative fees may be insufficient to pay for the broader goals of A.B. 32, namely, to deal generally with problems posed by global warming. Such an argument fails under *Sinclair Paint,* because CARB has made no findings in the Cap and Trade Regulation or elsewhere regarding "the estimated costs" of addressing the issue of global warming, in or outside of California, and no "total budgeted cost" of dealing with global warming has been projected. *Sinclair Paint,* 15 Cal. 4th at 876. CARB has not even estimated the extent to which California's greenhouse gas emissions reductions, at whatever cost, may have

any beneficial effect on reducing global warming, thereby running afoul also of *Sinclair Paint's* reasonable alignment requirement. *See* 15 Cal. 4th at 876.

Accordingly, for the four reasons set forth in this Section I.A.1., CARB's auction revenues fail the second prong of the *Sinclair Paint* test.

2. CARB's Auction Revenue Generation Fails To Meet the Third Prong of the *Sinclair Paint* Test Because the Winning Bids at CARB's Auctions Bear No Relationship to Any Burdens Imposed or Benefits Received by the Bidders from the Regulatory Program

The third prong of the *Sinclair Paint* test requires that the allocation of charges among payors reflect "a fair or reasonable relationship" between the charges allocated to each payor and "the payor's burdens on or benefits from the regulatory activity," 15 Cal. 3d. at 878. Because the revenues generated by CARB's auction are determined by competitive bidding among prospective payors, the ultimate allocation of these charges among payors can bear no more than an accidental relationship to either the burdens imposed or the benefits received by any individual payor.

In the context of A.B. 32, the relevant "burden imposed" by Covered Entities could be reasonably construed as their contribution to global warming. Yet the Cap and Trade Regulation acknowledges that different types of greenhouse gas emissions have different "global warming potential," depending on whether the emissions are of carbon dioxide or other greenhouse gases. *See* in 17 C.C.R. § 95802 (43) (definition of "carbon dioxide

equivalent"). The auctions, however, do not distinguish between allowances for the emission of greenhouse gases with relatively higher or lower "global warming potential." Thus, the ultimate allocation of charges at the conclusion of an auction bears a completely unknown relationship to the burdens imposed by the bidders' relative contributions to global warming. The allowances may be purchased by Covered Entities emitting solely carbon dioxide; or they may be purchased by Covered Entities emitting greenhouses gases with lesser or greater "global warming potential," in a variety of combinations. Consequently, the ultimate allocation of charges under the auctions can bear no more than a random relationship to any actual burdens imposed on the atmosphere by the successful bidders. Accordingly, because CARB does not know how the charges from the auctions are distributed with respect to the actual burdens imposed by Covered Entities, CARB cannot establish a "reasonable relationship" between charges and burdens imposed by payors, as required by *Sinclair Paint.*

Similarly, the allocation of charges under CARB's auctions bears no systematic or predictable relationship to the *benefits* successful bidders receive from emitting greenhouse gases. The amount a Covered Entity bids for allowances is determined by each Covered Entity's opportunity costs—in this case, the cost of reducing emissions by upgrading the Entity's facility instead of purchasing CARB's allowances at auction. (JA0840,0842). This internal

economic calculation will be unique to each firm, and will vary according to the age, capacity, specific use, and technology employed in each facility. It will also vary by utilization rate and the ease with which each Covered Entity can shift its production activities to other facilities. Assuming that bidders calculate their costs accurately, CARB's auction results will distribute emissions allowances roughly in proportion to the bidders' relative costs of participating or not participating in the auctions. But this does not meet *Sinclair Paint's* requirement that the allocation of charges must be "fairly or reasonably related" to the benefits Covered Entities receive from the regulated activity (JA0842, JA0690). The only "benefit" successful bidders receive here is the requirement to pay for what they had been doing before for free, and then to surrender the allowances purchased without receiving the purchase price back, only to pay additional sums for allowances covering subsequent compliance periods. Surely this stretches the term "benefit" to the breaking point.

Because CARB's auction revenues are not related to the costs of government regulatory services, but rather to the economic forces operating within the auction, the auction prices bear no discernable relationship to either the burdens on global warming posed by Covered Entities or the benefits they derive by participating in the auctions. Accordingly, the government cannot meet its burden of demonstrating that the auction mechanism apportions costs

in a manner reasonably related to either the burdens or benefits of payors. *Sinclair Paint*, 15 Cal. 4th at 878; *see Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game*, 79 Cal. App. 4th 935, 945 (2000) (citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.*, 165 Cal. App. 3d. 227, 235 (1985)).

3. CARB's Auction Revenue Generation Fails To Meet the Fourth Prong of the *Sinclair Paint* Test Because the Cap and Trade Regulation Does Not Prohibit the Revenue from Being Used "For Unrelated Revenue Purposes"

CARB's Cap and Trade Regulation provides no indication regarding where or how the revenues from the auctions will be used. Neither does A.B. 32. Accordingly, neither prohibits the auction revenues from being used for "unrelated revenue purposes," which contravenes the fourth prong of the *Sinclair Paint* test. 15 Cal. 4th at 878. The sole question remaining is whether any combination of the bills enacted by the Legislature in 2012 or later, purporting to allocate the auction revenues, satisfies that fourth prong. The answer is no.

S.B. 1018, enacted in 2012, does not amend A.B. 32. Rather, it establishes the "Greenhouse Gas Reduction Fund" as a special fund in the State Treasury and requires that any money collected by CARB through its auction or sale of emissions allowances be deposited into that fund and made available for appropriation by the Legislature. Gov't Code § 16428.8 (a), (b). The statute explicitly provides: "Notwithstanding any other law, the

Controller may use the moneys in the fund for cash flow loans to the General Fund." *Id.* § 16428.8(d). The statute does not dedicate the cash flow loans for any specific purpose, and the Controller is free to use the loan proceeds for any purpose he may deem fit. Moreover, nothing in S.B. 1018 dedicates or limits the use of *any* amounts in the Greenhouse Gas Reduction Fund to any specific purpose.

Next, neither A.B. 1532 nor S.B. 535 amends A.B. 32. The two bills work in tandem to provide some general guidance on how monies located in the Greenhouse Gas Reduction Fund should be spent, but they fail to identify which projects will qualify for funding. A.B. 1532 directs California's Finance Department to develop a three-year investment plan to use the funds to reduce greenhouse gas emissions. Investments would target areas such as clean energy, low carbon transportation and infrastructure, natural resource protection, and research and development. As set forth in footnote 2, *supra,* on May 14, 2013, California issued a first version of the Investment Plan called for in A.B. 1532, but that document does not prohibit auction revenues from being used for "unrelated purposes." By its own terms the Investment Plan merely identifies and prioritizes a wish list for the utilization of auction revenues, subject to legislative approval (JA0736). ("[I]nclusion of a recommended investment in this plan does not guarantee funding.")

In turn, the 2012-enacted S.B. 535 requires the Finance Department to set aside 25% of the Greenhouse Gas Reduction Account to projects benefitting disadvantaged communities, and at least 10% of that fund must go toward projects actually located in such communities. Of course, S.B. 535 begs the question: What if any evidence is there to establish that the 25% or 10% set-asides for disadvantaged communities bear any "related purpose" to greenhouse gas emissions or, for that matter, to global warming? *See* 15 Cal. 4th at 878. Although it may be a good thing to benefit disadvantaged communities, and although A.B. 32 encourages CARB to ensure that such communities benefit from "statewide efforts to reduce global warming," CARB has not established any relationship between reducing greenhouse gas emissions and benefitting disadvantaged communities. And the fact that neither A.B. 1532 nor S.B. 535 actually sets forth how the funds will be used for specific greenhouse gas emissions reductions projects means that neither the Legislature, nor CARB, has dedicated either the 25% or, for that matter, the remaining 75% of the funds in a manner that meets the fourth prong of the *Sinclair* test.[3]

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[3] This issue is also relevant to the third prong of the *Sinclair Paint* test, namely, whether there is any "reasonable relationship" to the social or economic burdens generated by covered entities that emit carbon dioxide. *See Sinclair Paint*, 15 Cal. 4th at 878. No such relationship is evident in the Cap and Trade Regulation, A.B. 32, or any of the 2012 or 2014 enactments.

In turn, A.B. 1464, the last of the 2012 enactments, does not amend A.B. 32. Rather, it provides that, notwithstanding any other provision of law, the Director of Finance may allocate or otherwise use an amount of "at least" $500 million from moneys derived from the sale of greenhouse gas emission allowances, and make commensurate reductions to General Fund expenditure authority. 2012 Stats. Ch. 21, § 15.11(a). Although A.B. 1464 provides that the "funds shall be available to support the regulatory purposes of [A.B. 32]," section 15.11(a), the enactment does not define the criteria by which the Director of Finance shall decide whether any particular expenditure may "support the regulatory purposes" of A.B. 32. That glaring omission, when considered in light of the explicit authority to "make commensurate reductions to General Fund expenditure authority," provides the Director of Finance with more leeway than permitted under *Sinclair Paint* with regard to the "at least" $500 million he is authorized to siphon from the Greenhouse Gas Reduction Fund. Accordingly, for purposes of *Sinclair Paint*, A.B. 1464 does not sufficiently constrain the Director of Finance from using the funds for "unrelated purposes" and, therefore, fails the fourth prong of the *Sinclair Paint* test.

The 2014 bills fare no better, because they allocate auction revenues for purposes that on their face are "unrelated" to greenhouse gas reduction, such as affordable housing and high-speed rail. *See* Statement of Facts, *supra*.

B. The Trial Court Erred in Holding That the Auction Revenues Are Not Unconstitutional Taxes Under Proposition 13

The court below held that the billions of dollars to be generated by the auctions are not taxes under Proposition 13 because: (1) CARB did not have a predominantly revenue-generating purpose in rasing the billions; (2) successful auction bidders pay market prices for emissions allowances; (3) payments for the emissions allowances are voluntary, and (4) the auction revenues cannot be used for general government purposes. Opinion at 17-22 (JA1611-1616). The trial court was mistaken on all points.

The trial court acknowledged that:

> It is undisputed that the auction provisions of A.B. 32 will result in a cumulative net increase in state revenues [and that] if the cost of allowances are 'taxes,' A.B. 32 violates Proposition 13.

JA1607. While characterizing the Proposition 13 challenge as "a close question," the trial court held that the revenues were fees and not taxes (JA1609-1610).

The court did not try to address the burdens of proof or standards of review established by *Sinclair Paint* and its progeny. Rather, it cobbled together burdens and standards that are unrecognizable under the four-pronged analysis mandated by *Sinclair Paint.* "The decisions of [the California Supreme Court] are binding upon and must be followed by all the state courts

of California." *McClung v. Employment Dev. Dep't*, 34 Cal. 4th 467, 473 (2004).

Significantly, the California Legislature has recognized that the auction revenues are subject to the *Sinclair Paint* test. S.B. 957, the Budget Act of 2012-2013, states:

> The Legislature finds that . . . the funds generated by the [CARB auctions] are regulatory fees [under] *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866.

S.B. 957, Section 15.11c. Thus, the Legislature has acknowledged that the *Sinclair Paint* test applies to any determination of whether the auction revenues at issue here are unconstitutional taxes under Proposition 13. On the other hand, the *substantive* finding of the 2012 Legislature that the auctions constitute regulatory fees need be given no weight because

> [a] legislative declaration of an existing statute's *meaning* is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts.

Western Security Bank v. Superior Court, 15 Cal. 4th 232 (1997) (emphasis added). The same can be said for CARB's own views regarding whether the auctions are fees or taxes: "This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency." *Samantha C. v. State Dept. of Developmental Services*, 185 Cal. App. 4th 1462, 1482 (2010), (quoting *Aguiar v. Superior Court*, 170 Cal. App. 4th 313, 323 (2009)).

Giving short shrift to *Sinclair Paint,* the lower court opines that the enormous sums to be generated by the auctions are mere "byproducts" of the regulatory program to curb carbon dioxide emissions and revenue generation is not the "primary reason"for the auctions (JA1615). But neither *Sinclair Paint* nor its progeny suggest that, where the revenue generation is a "byproduct" of a regulatory program, *the Sinclair Paint* standards are inapplicable. To the contrary, *Sinclair Paint* itself is a case in which the Supreme Court decided whether the revenues generated as a "byproduct" of a regulatory program aimed at curbing lead poisoning constituted taxes subject to Proposition 13. 15 Cal. 4th at 874-76. Calling the auction revenues a "byproduct" of the regulation does not make them any less of a tax.

Moreover, the lower court's holding falls under the weight of its own analysis. Assuming arguendo the lower court's conclusion that raising revenues was a byproduct of the regulatory scheme and not the primary reason for the Auction Provisions, that is irrelevant to the issue of whether the auctions are constitutional. There is no dispute that A.B. 32 did not pass with the required two-thirds supermajority. There is no dispute that the auctions will raise billions of dollars for the state. And there is no dispute that CARB *intended* to raise those billions. It was not an accident. Accordingly, using the specific language of Proposition 13, the auctions came about "for the purpose of increasing revenues collected," regardless of whether that purpose was a

primary, secondary, or tertiary one. Cal. Const. art. XIII A, § 3. At the very least, CARB's "purpose of increasing revenues collected" *furthered* one or more of CARB's other purposes, making it *a* purpose of the auctions. Significantly, the lower court cited no case standing for the proposition that, where regulation is the primary purpose, revenues cannot be considered taxes.

The court's citation to *California Taxpayers' Ass'n v. Franchise Tax Bd.*, 190 Cal. App. 4th 1139 (2010), justifies neither the reasoning employed nor the result reached. *California Taxpayers* involved a statutory penalty imposed upon corporate taxpayers who underpaid their taxes by more than $1 million. The issue was whether the government should be required to show that the penalty was "reasonably necessary to the cost of providing [a] service or regulatory activity." *Id.* at 1145. The Fourth Appellate Division held that the government need not be put to that showing because, under the circumstances of that case, "[w]e do not deal with a situation in which *only the government has the information* to show the cost of the service or regulatory activity . . .. Instead we deal with a statutory '*penalty*' that applies only if a 'tax' has not been fully paid." *Id.* at 1146 (emphasis added). By contrast, this case *is* a situation in which, if anyone has information regarding the "cost of the service or regulatory activity" at issue, namely the costs of reducing greenhouse gas emissions sufficient to comply with the Cap and Trade Regulation or, more generally, the costs of dealing with global warming, *only*

the government could have such information. Auction bidders cannot be expected to divine those costs. Rabo Reply Decl. ¶¶ 17-18 (JA1399-1400). Moreover, here no one has asserted that the auction revenues constitute a "penalty."

The court's citation to *Schmeer v. County of Los Angeles*, 213 Cal. App. 4th 1310 (2013), also is not helpful. *Schmeer* involved Proposition 26, under which the distinction between a regulatory fee and a tax is irrelevant. *Id.* at 1323-25. That case held that a county ordinance enacted after the effective date of Proposition 26 requiring customers to pay 10 cents for each paper carryout bag provided by retail stores was not a tax because the money was paid to the stores and was not remittable to any level of government. *Id.* at 1326. By contrast, here billions are going to the state government. Under these circumstances, the instant case sets up "a clear, substantial, and irreconcilable conflict" between the auctions, on the one hand, and the California Constitution on the other hand. *Pajaro Valley Water Mgmt. Agency v. Amrhein*, 150 Cal. App. 4th 1364, 1380 (2007), (quoting *Orange County Water District v. Farnsworth*, 138 Cal. App. 2d 518, 530 (1956)). These are precisely the circumstances to which *Sinclair Paint* applies.

The lower court opines further that, because auction bidders get something of value that may be traded, auction revenues are not a tax. (JA1611). But value passes to a payor in many situations that have long been

recognized as taxes. For example, when a consumer purchases any tangible thing, a sales tax is paid. The fact that the tangible item has value does not make the sales tax any less of a tax. Although it is true that financial firms may benefit if they trade allowances profitably, Covered Entities are required to obtain emissions allowances in order to stay in business in California. The only "benefit" they receive is the ability to continue doing what they have always been doing, but they will be required to do less of it and pay for the "privilege."

The lower court observes that the auction differs from paying a tax because the amount of the payment is not determined by a tax rate, tax schedule, or other act of the government. That is not true. CARB has set a minimum price for all emissions allowances. The Cap and Trade Regulation states that "[e]ach auction will be conducted with an auction reserve price" established by CARB, 17 C.C.R. § 95911(b)(1), and "[n]o allowances will be sold at bids lower than the auction reserve price," 17 C.C.R. § 95911(b)(2). Thus, the minimum payment that must be paid at auction is determined by an act of government. For example, CARB established the auction reserve price, or floor price, at a minimum bid of $10 for the first auction and $10.71 for the following two auctions. Rabo Reply Decl. ¶ 13 (JA1399).

The court goes on to state that auction revenues are not taxes because participation in the auctions is voluntary and not mandatory. But Covered

Entities are required to have emissions allowances in order to emit carbon dioxide. It is true that they may choose to move out of the state and no longer be subject to the California emissions requirements. By the same token, a California resident may choose to move out of the state and no longer be subject to California income taxes. But that does not make the state income tax any less of a tax. One of the declarants stated it well: "Morning Star has absolutely no choice but to participate in the auctions if it wants to stay in business in California." *See* Rabo Reply Decl. ¶ 14 (JA1399). "The notion that, as a Covered Entity, Morning Star's participation in the CARB auctions is somehow 'voluntary' is both false and ridiculous." Rabo Reply Decl. ¶ 16 (JA1399). Significantly, any distinction between "voluntary" and "compulsory" payments played no role in the tax-versus-fee analysis in the *Sinclair Paint* and *Cal. Farm Bureau* decisions.

Next, the lower court states that auction revenues are not taxes because they cannot be used for the general support of the government (JA1614). But that is not true, either. Before the 2012 statutes were enacted, there were no limitations on expenditures of auction revenues. After the 2012 statutes were enacted, some limitations were imposed, but not in ways that support the lower court's holding. For example, S.B. 535 requires the Finance Department to set aside 25% of the Greenhouse Gas Reduction Account to projects benefitting "disadvantaged" communities, and at least 10% of that fund must go toward

projects actually located in such communities. Benefitting disadvantaged communities is an important function of general government, and 25% of many billions of dollars could go a long way toward providing the government with the means to discharge such a general obligation. Thus, not only can a good portion of the total auction revenues be used to support general government responsibilities, but it *must* be so used.

In addition, A.B. 1464 provides that the Director of Finance may allocate or otherwise use an amount of "at least" $500 million from moneys derived from the sale of emissions allowances and make commensurate reductions to *General Fund* expenditure authority. There is no limit to the amount of funds that actually can be used in this way. Finally, S.B. 1018 authorizes the Controller to borrow funds from the auction revenues "for cash flow loans to the General Fund." Gov't Code § 16428.8(d). Interestingly, the *entire amount* deposited into the Greenhouse Gas Reduction Fund from the first three auctions were immediately "borrowed" for use in the General Fund. (JA0759).

II

CARB'S AUCTION IS ULTRA VIRES BECAUSE A.B. 32 DOES NOT AUTHORIZE CARB TO GENERATE BILLIONS OF DOLLARS OF REVENUE

Statutes should be construed whenever possible so as to preserve constitutionality, based on the presumption that the Legislature intended not

to violate the Constitution. *Harrot v. County of Kings*, 25 Cal. 4th, 1138, 1153 (2001). Accordingly, courts will construe a statute so as to avoid addressing its constitutionality, even though another construction may also be reasonable. *Id.* Because A.B. 32 may be reasonably construed so as not to authorize the Auction Provisions, the principal of constitutional avoidance informs the judgment of this Court on the ultra vires issue. This Section addresses that issue.

A. No Deference Is Given to an Administrative Agency's Interpretation of a Statute When the Issue Is Whether an Agency's Regulation Transgresses Statutory Power

The Supreme Court has stated:

> [I]n finding that the challenged regulations contravened legislative intent, [we] rejected the agency's claim that the only issue for review was whether the regulations were arbitrary or capricious. . . . *Administrative regulations that alter or amend the statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to strike down such regulations.*

Cal. Ass'n of Psychology Providers v. Rank, 51 Cal. 3d at 11 (emphasis added, internal quotation marks and citation omitted). The Supreme Court recently echoed these sentiments in *Western States Petroleum Ass'n v. Board of Equalization*, 57 Cal. 4th 401, 416 (2013) (courts exercise independent judgment on issues of whether a regulation exceeds statutory authority). Because the issue here is whether CARB transgressed its statutory power by

including the auctions as part of the Cap and Trade Regulation, deference to CARB's statutory interpretation is neither merited nor permitted.

B. A.B. 32 Does Not Authorize CARB To Generate Billions of Dollars From the Sale or Auction of Emissions Allowances

No provisions of A.B. 32, either individually or collectively, authorize the Auction Provisions promulgated by CARB.

1. A.B. 32's Only Fee Provision Does Not Authorize an Auction

A.B. 32's sole fee provision authorizes CARB to promulgate regulations adopting "a schedule of fees to be paid by [regulated] sources of greenhouse gas emissions." Health & Safety Code § 38597. The revenues are to be used "for purposes of carrying out this division." *Id.* Nothing in section 38597 authorizes CARB to auction the emissions allowances that it creates. By its own terms, section 38597 contemplates that regulatory fees will pay for the costs of CARB's implementation of A.B. 32.

CARB promulgated separate fee regulations implementing section 38597, whose purpose is to "collect fees to be used to carry out the California Global Warming Solutions Act of 2006, as provided in Health and Safety Code section 38597" (citations omitted). 17 C.C.R. § 95200. The formula to be used to calculate the amount of administrative fees provides for the recovery of the total costs of implementing A.B. 32. *Id.* § 95203. Because the fee regulations provide the funds needed by CARB to "carry out" A.B. 32's

mandates, there is no need for proceeds from an auction to cover CARB's costs of administering or implementing those mandates.

2. A.B. 32's "Market-based Compliance Mechanisms" Language Does Not Authorize CARB To Collect Auction Revenue

A.B. 32 permits but does not require CARB to regulate greenhouse gases by a market-based cap and trade program. Specifically, Part 5 of A.B. 32, sections 38570, 38571, and 38574, sets forth guidelines for rules should CARB establish "market-based compliance mechanisms." None of these provisions explicitly authorize CARB's auctions. CARB's auction scheme is a massive multi-billion dollar program that reaches into every nook and cranny of California's economy. It has the potential of creating huge alterations, and even dislocations, in the range of businesses operating in California. Its impact on jobs and the loss of jobs is poorly understood, at best. A court should not take lightly CARB's attempt to divine its authority to undertake such a massive and far-reaching program from a few snippets of A.B. 32—snippets that do not provide any clear authority for what has evolved into one of California's most intrusive regulatory schemes in its history.

Section 38570c states that CARB "shall adopt regulations governing how market-based compliance mechanisms may be used by regulated entities subject to greenhouse gas emission limits . . . to achieve compliance." (Emphasis added.) The plain language directs CARB to create "compliance

mechanisms" for the use of those who must meet greenhouse gas emissions limits. *Regents of Univ. of Cal. v. East Bay Mun. Util. Dist.*, 130 Cal. App. 4th 1361, 1372-73 (2005) (courts must give meaning and purpose to every word used by the Legislature). But CARB itself has no obligations to comply with emissions limitations. By becoming a direct participant in the market-based compliance mechanisms it has established, CARB has set the stage to be the recipient of billions of dollars of auction revenues, which the language of A.B. 32 does not support. *People v. McNamee*, 96 Cal. App. 4th 66, 72 (2002) (statutory interpretation leading to absurd results must be avoided).

In turn, section 38505(k) of AB 32 defines the term "market-based compliance mechanism" to mean either of the following:

> (1) A system of market-based declining annual aggregate emissions limitations for sources or categories of sources that emit greenhouse gases.
>
> (2) Greenhouse gas emissions exchanges, banking, credits, and other transactions, governed by rules and protocols established by the state board, that result in the same greenhouse gas emission reduction, over the same time period, as direct compliance with a greenhouse gas emission limit or emission reduction measure adopted by the state board pursuant to this division.

Health & Safety Code § 38505(k) (emphasis added). The language in subdivision 1 does not explicitly authorize an auction. Neither is there any indication that CARB's auction scheme is required or desired to implement the "system of market-based annual aggregate emissions limitations." Indeed,

subsection 1 states that market-based emissions limitations are for "sources that emit greenhouse gases," in other words, for Covered Entities. At most, subdivision 1 is silent regarding the appropriateness of an auction. *Dean v. Superior Court*, 62 Cal. App. 4th 1066, 641-42 (2002) (statute's silence not be interpreted as authorization).

Focusing on subdivision 2, there is nothing that expressly provides authority for CARB's Auction Provisions. Subdivision 2 speaks specifically to actions that are to be taken *by* Covered Entities under CARB-generated "rules and protocols," and conspicuously omits any use of the term "allowances," using instead the term "credits" when referring to transactions among Covered Entities, saving the term "allowances" for CARB's *creation* of compliance instruments. *Lungren v. Deukmejian*, 45 Cal. 3d. 727, 735 (1988) (use and omission of statutory terms must be construed in the context of the statute as a whole).

Further, the statutory terms that precede the term "other transactions" provide for "exchanges, banking [and] credits." Those terms imply business transactions *among* Covered Entities and not business transactions between Covered Entities and the regulator CARB. As one California appellate court stated, "a word takes meaning from the company it keeps." *People v. Jones*, 112 Cal. App. 4th 341, 354 (2003). In fact, the Supreme Court of California has long applied the statutory construction principle of *esjusdem generis*,

which "holds that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated." *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d. 1142, 1160 (1991) (internal quotes and citations omitted).

Thus, nothing in Section 38505(k) can be fairly characterized as a grant of authority to CARB to establish an auction system by which CARB may generate billions of dollars of revenue for the state. Significantly, no provision of A.B. 32 sets forth or attempts to define even the most basic elements of an auction, such as a seller, an auctioneer, bidders, or the fate of the auction proceeds. Indeed, the term "auction" is an utter stranger to the statute, as well as to it's pre-enactment legislative history. If the Legislature had intended to authorize auctions of this magnitude in connection with the creation and distribution of allowances to Covered Entities it could have easily said so. But it did not.

It is true that the Cap and Trade Regulation itself defines the term "auction" as "the process of selling California Greenhouse Gas Allowances by offering them up for bid, taking bids, and then distributing the allowances to winning bidders." But this regulatory definition of a term that does not appear anywhere in the statute is more than a mere regulatory gap filler. It is CARB's attempt to arrogate power to itself. "An administrative agency must act within

the powers conferred upon it by law and may not act in excess of those powers." *Am. Fed'n of Labor and Congress of Indus. Org. v. Unemployment Ins. Appeals Bd.*, 13 Cal. 4th 1017, 1042 (1996).

Where a statute does not expressly grant a power to an administrative agency, it is sometimes necessary to construe the statute to imply such a power, but a long line of California cases, including cases decided by this Court, holds that implied powers must be narrowly construed, and powers will not be implied unless essential to effectuate the statutory purpose. *See Cox v. Kern Cnty. Civil Serv. Comm'n*, 156 Cal. App. 3d. 867, 873 (1984) ("[C]ourt would still look to Ordinance No. A-126 to determine whether the power to adopt such a rule was indispensable to effectuation of the objects and purposes of the civil service system."). *See also, Water Quality Ass'n v. Cnty. of Santa Barbara,* 44 Cal. App. 4th 732, 746 (1996) ("The only implied powers . . . are those essential to the limited declared powers provided by its enabling statute."); *Addison v. Dep't of Motor Vehicles*, 69 Cal. App. 3d. 486, 498 (1977) (implied power must be "indispensable").

CARB has acknowledged that the sale of emissions allowances is not essential to its implementation of A.B. 32 or to the Cap and Trade Regulations, and that allowances could just as well be "distributed free of charge." *See* CARB's *Final Statement of Reasons for Rulemaking, California Cap-and-Trade Program* (Oct. 2011), at 732 (JA0812) and 2190 (JA0813-JA0814).

Accordingly, because sale of emissions allowances is neither essential to the purposes of A.B. 32, nor is it indispensable to CARB's implementation of A.B. 32 or to the Cap and Trade Regulations, such a statutory power should not be implied.

When all is said and done, there is a conspicuous omission in A.B. 32: The statute is utterly silent regarding what, if anything, CARB could do with any revenues collected from the auction of emissions allowances. If the Legislature had contemplated that there would be an auction of allowances, surely it would have provided CARB with at least some direction as to how the funds from any such auction would be used, or at least how the funds would be stored for safekeeping before a use was found for them. But there is no such legislative direction in A.B. 32, further evidencing that the statute did not contemplate the auction scheme established by CARB's Cap and Trade Regulation.

3. The Trial Court Erred When It Held That The Auction Provisions Are Authorized Under A.B. 32

Without addressing the important details discussed in Sections II.A.1, and II.A.2, the lower court held that because the "design" of a cap-and-trade program requires choices concerning how to "distribute" allowances, CARB is necessarily authorized to sell emissions allowances at auction. Opinion at 9-10 (JA1603-1604). But neither A.B. 32 nor the Cap and Trade Regulation define "distribution" or "design" or any variants thereof. Nevertheless, the

lower court insisted that the use of the term "distribution" authorizes CARB to auction emission allowances.

The holding is at odds with precedent established in this Court. For example, in *Miller Brewing Co. v. Dep't of Alcoholic Beverage Control*, 204 Cal. App. 3d. 5, 1213 (1988), this Court stated:

> [T]he wide spectrum of accepted definitions of the term "distribution" . . . gives rise to ambiguity . . . . [To resolve ambiguity a court must] discern legislative intent [and] examine the legislative history and the statutory context of the act under scrutiny. . ..
>
> Furthermore, we are not bound to the Department's construction . . . . [N]o deference to an administrative interpretation of [a statute] is required [if] the meaning of the applicable statutory language and its legislative history is accessible.

Id. at 12-13. Moreover, the California Supreme Court addressed the meaning of the statutory term "distribution," found the meaning unclear, and consulted the "legislative history of the statute and the wider historical circumstances of its enactment." *California Mfrs. Ass'n v. Public Utilities Comm'n*, 24 Cal. 3d. 836, 844 (1979). For a discussion of A.B. 32's legislative history, *see* Section II.B, *infra*.

Next, the lower court offers a statement by the California Climate Action Team to support its finding that the Legislature understood the phrase "distribution of emissions allowances" to encompass both giving away allowances and selling them at auction. (JA1604). The self-serving statement made by the California Climate Action Team, which has responsibility for

implementing parts of A.B. 32 and other California greenhouse gas initiatives, provides no insight into legislative intent. The court could have submitted with equal probity a statement from CARB itself, opining that A.B. 32 authorizes auctions. *Ass'n for Retarded Citizens v. Dep't of Developmental Services*, 38 Cal. 3d. 384, 391 (1985) (self serving statements of administrative agency regarding its scope of authority are neither authoritative nor persuasive).

The lower court also observed that "if the Legislature had meant to exclude the sale of allowances, it would have said so. It did not." (JA1604). But that turns the law on its head. An administrative agency may only do that which it is authorized to do by statute. Cal. Gov't Code § 11342.1-2 (regulations must "be within the scope of authority conferred"); *Martinez v. Combs*, 49 Cal. 4th 35, 61 (2010) (agencies can do only what statutes authorize); *O'Grady v. Superior Court*, 139 Cal. App. 4th 1423, 1443 (2006) (a statute "is presumed to exclude things not mentioned"). It would be a startling proposition if CARB could do *anything* not explicitly prohibited by A.B. 32. *Dean*, 62 Cal. App. 4th at 641-42 (statute's silence does not constitute authorization).

The lower court goes on to observe that the Legislature was aware of the Cap and Trade program in the federal Clean Air Act, which authorizes auctions, concluding erroneously that the Legislature must have intended to

authorize any and all auctions in A.B. 32, even the budget-busting multi-billion dollar scheme before this Court. Yet contrasting the lack of any provision in A.B. 32 for auctions against the detailed auction provisions of the Clean Air Act underlines the fact that A.B. 32 does not include or authorize even the most basic elements of an auction found in the Clean Air Act. Title IV of the federal Clean Air Act governs the emission of sulfur oxides ("SOx"), and authorizes a maximum of 1% of the total allowable emissions to be set aside for auction. Even for that small percentage, the Clean Air Act provides explicit and detailed directions to the United States Environmental Protection Agency ("EPA") regarding how auctions must be conducted, by whom, when, and how auction revenues must be handled. *See* 42 U.S.C. § 7651o. Notwithstanding the availability of this federal model, the California Legislature did not even use the term "auction" in the statute, let alone define its parameters. The fact that the California Legislature was aware of the Clean Air Act's detailed provisions and, therefore, knew how auctions could be explicitly authorized, supports the conclusion that the Legislature did not intend for CARB to auction emissions allowances via the massive revenue-generating scheme that is before this Court.

The lower court opines further that an expansive reading of section 38562(b)(1) is appropriate because A.B. 32 generally provides broad delegation to CARB to implement the overall regulatory program without

detailed legislative guidance or constraint. That is not true. A.B. 32 requires CARB to take specific steps to implement the legislative goal of reaching 1990 emissions levels by 2020. For example, section 38562(b) requires CARB to do the following to achieve "the statewide greenhouse gas emissions limit:" (1) provide due credit to those who have made early voluntary emissions reductions, (2) make actions under A.B. 32 consistent with ambient air quality standards and toxic contaminant emissions requirements, (3) minimize the administrative burden of implementing and complying with the regulations, (4) minimize "leakage" (i.e., the flight of Covered Entities out of California resulting from the regulations), and (5) consider regulatory cost effectiveness, societal benefits, and "other benefits to the economy, environment, and public health." *Id.* And A.B. 32 has a smorgasbord of other specific requirements with which CARB must comply in designing the regulations, including, e.g., (1) "rely on the best available economic and scientific information . . . when adopting the regulations," Health & Safety Code § 38562(e); (2) achieve "real, permanent, quantifiable, and enforceable" emissions reductions, section 38562(d)(1); and (3) "consult with other states and the federal government, and other nations to identify the most effective strategies and methods to reduce greenhouse gases . . .." Section 38564. A.B. 32 also gives specific direction to CARB in connection with CARB's development of "market-based compliance mechanisms," including, e.g., (1) "prevent any increase in

emissions of toxic air contaminants and criteria pollutants," section 38570(b)(2); (2) "maximize additional environmental and economic benefits," section 38570(b)(3); and (3) "adopt regulations governing how market-based compliance mechanisms may be used *by regulated entities subject to greenhouse gas emission limits* . . . to achieve compliance with *their* greenhouse gas emissions limits." Section 38570c (emphasis added). The latter provision is especially informative, since it shows that the Legislature authorized CARB to develop "market-based compliance mechanisms" specifically so that "regulated entities" could "achieve compliance with their greenhouse gas emissions limits," and not so that CARB could generate billions for the state.

Given these explicit, specific, and detailed legislative directives, it would be odd indeed if the Legislature intended to authorize CARB's scheme of auctions by silence. It did not, as evidenced by the legislative history.

C. The Legislative History Makes Clear That The Legislature Did Not Intend To Authorize an Auction When It Enacted A.B. 32

1. The Legislative Floor Debate on A.B. 32 Shows a Legislative Intent for CARB *Not* To Sell Emissions Allowances

The Assembly floor debate on the enacted version of A.B. 32 occurred on August 31, 2006.[4] *See* DVD of Legislative Floor Debate on A.B. 32 (JA08340; *See also,* Francois Decl. ¶¶ 3, 4-5 (JA0834). During that debate, Assemblymember Fabian Nunez, the author of A.B. 32 and the then-Speaker of the Assembly, responded to claims made by opposing Assemblymembers that A.B. 32 constituted a tax that was being levied in California. Francois Decl. ¶ 11 (JA0835). For example, Assemblymember George A. Plescia said

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[4] DVD (JA0814) obtained on June 3, 2013, by Anthony L. Francois from the Office of Assembly Television. Mr. Francois' declaration setting forth the authenticity of the DVD, as well as the chain-of-custody, was filed in the lower court. Francois Decl. ¶¶ 4-8. (JA-0833-08356). All references to the Assembly Floor Debate are to the time stamps on the DVD (JA0814), a hard copy of which has been submitted to this Court as part of the hard copy of the JA. The time stamps reflect when the floor statements were made during the legislative debate leading to the vote on A.B. 32. The DVD can be played on a computer running the Windows operating system using the Windows Media Player. The DVD should automatically play. If it does not, please follow the following instructions. In Windows Media Player, click on the "Exit Full-Screen Mode" icon located on the lower right hand side of the window. A smaller window will appear on the screen. Then, click on the "Switch to Library" icon located in the upper right hand side of the window. In the window that appears next, make sure that the "Play" tab is activated. Then, double-click on the "Title 1" link located near the middle of the right-hand panel of that window. At that point the DVD should be fully functional and begin playing. Francois Decl. ¶ 8. Specific time stamps on the DVD can be accessed using Windows Media Player by dragging the progress bar to the time stamp desired. *Id.* The first 35 minutes and 20 seconds of Exhibit F do not relate to A.B. 32 but were included in the DVD as received by Mr. Francois from the Office of Assembly Television. Francois Decl. ¶ 9.

that A.B. 32 provides "an open checkbook for the air resources board." DVD at 1:38:03-06. (JA0814) He went on to say that anyone voting for A.B. 32 would be voting to make CARB "the largest taxing agency since the Board of Equalization." *Id.*, DVD at 1:38:06-14. He went on to assert: "If you vote for this, you're voting for an SUV tax." *Id.*, DVD at 1:38:37-45. Finally, he stated: "You're going to be voting for a cow tax with methane gas." *Id.*, DVD at 1:38:45-49.

In response to these and similar statements by others, Speaker Nunez stated on the floor, immediately before the vote, that the intent of A.B. 32 is to provide funds "for program administration and costs only." *Id.*, DVD at 1:45:13-19. He immediately went on to say, "I'll give you my word today that next year I'll introduce a bill if necessary to make sure that happens in order that I get your support on this bill." *Id.*, DVD at 1:45:20-34. Thus, the author of the bill urged the Assembly to vote in favor of passage specifically based upon his representation that the only funds A.B. 32 would generate are those for "program administration and costs." Sadly, the promise to introduce a bill "to make sure that happens" was never fulfilled. As stated by the California Supreme Court, "[d]ebates surrounding the enactment of a bill may illuminate its interpretation." *In Re Marriage of Bouquet*, 16 Cal. 3d. 583, 590 (1976).

Further, on the very day of the vote on A.B. 32, Speaker Nunez sent to the Legislature a "Letter of Legislative Intent," in which he confirmed that

"any funds provided by Health and Safety Code section 38597, are to be used solely for the direct costs incurred in administering [A.B. 32]." (JA0815). Indeed, Speaker Nunez referred directly to that letter on the floor immediately before the vote, as part of his effort to encourage the Legislature to enact the bill. DVD 1:45:18-22 (JA0814). *See* 16 Cal. 3d. at 590 ("letter of legislative intent" of Assemblyman Hayes commands respect on the issue of the Legislature's intent "through the light it sheds upon" the meaning of the bill as passed).

The lower court observes that the "Legislative Letter of Intent" submitted by the author of A.B. 32 is not dispositive. But the court ignored the floor debate in the Assembly that generated the letter. Petitioners submitted to the lower court a DVD containing the entire Assembly debate on A.B. 32, showing in detail the Assembly proceedings, yet the court did not mention the debate or the DVD in its opinion. "Debates surrounding the enactment of a bill may illuminate its interpretation." 16 Cal. 3d at 590.

2. A Legislative Effort in 2009 To Amend A.B. 32 To Authorize the Use of Auctions Died on the Floor of the Senate

After the enactment of A.B. 32, Senator Pavley introduced legislation, known as S.B. 31, that would have authorized CARB to conduct auctions. S.B. 31 never left the Senate, which was the house of origin, and died on the floor. (JA-0665). Thus, the Legislature had the opportunity in 2009, before

CARB's promulgation of the Cap and Trade Regulation, to authorize auctions but did not avail itself of that opportunity, further showing that the Legislature did not intend to authorize them. *See Seibert v. Sears Roebuck & Co.*, 45 Cal. App. 3d. 1, 19 (1975) (Legislature's failure to enact an amendment may shed light on legislative intent of prior enactment when the "full context of circumstances" is considered.).

Ignoring *Seibert,* the lower court observed that the Legislature's failure to enact S.B. 31 has "little value." (JA1604). Instead, it cited *Apple Inc., v. Superior Court*, 56 Cal. 4th 128, 146 (2013), which is inapposite. In *Apple,* the issue was whether failed legislation intended to *remove* authorization to act indicated that the existing statute contained such authorization. The Court stated that "the Legislature may have concluded that it was unnecessary to remove online transactions from the statute's coverage because such transactions were never covered by the statute in the first place." *Id.* That is the *opposite* of the situation here, where the issue is whether the 2009 failed legislation, which sought to *authorize* the auctions three years after the enactment of A.B. 32, evidences legislative intent *not* to authorize them. In any event, given the *Seibert* decision, failure to enact legislation authorizing the auctions is certainly relevant to the issue of legislative intent and should not have been given such short shrift by the lower court.

D. Because the Auctions Are Not Authorized by A.B. 32, CARB's Cap and Trade Regulation Is Ultra Vires Thereunder

The authority to sell carbon emissions credits at auction to generate billions of dollars of revenues for the state is a stunning power for an administrative agency to arrogate to itself. Taken together, the evidence provides overwhelming support for the conclusion that the Legislature did not intend to grant this kind of auction authority to CARB in A.B. 32. *Lungren*, 45 Cal. 3d. at 733-43 (all relevant evidence should be used to interpret a statutory provision). *See McGlothlen v. Dep't of Motor Vehicles*, 71 Cal. App. 3d. 1005, 1015 (1977) (courts may consider any appropriate material in construing statutes, including, legislative history, materials that contain economic, political or social facts, findings or opinions, and other relevant "extrinsic aides"). *See also, Seibert v. Sears Roebuck & Co.*, 45 Cal App. 3d. at 19 (appropriate to review "full context of circumstances" of legislative action or inaction to determine legislative intent).

In light of all of the circumstances, CARB's establishment of an auction system generating billions of dollars in revenues for the state as part of the Cap and Trade Regulation is an ultra vires act. *Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 100 Cal. App. 4th 1066, 1072 (2002) ("[T]he discretion exercised by [an administrative agency] is not absolute but must be exercised in accordance with the law."). As such, the

auction provisions of the Cap and Trade Regulation are void. *Water Replenishment Dist. of Southern Cal. v. City of Cerritos*, 202 Cal. App. 4th 1063, 1072 (2012) ("conduct by an agency lacking authority to engage in that conduct is void"); *Turlock Irrigation Dist. v. Hetrick*, 71 Cal. App. 4th 948, 951 (1991) (irrigation district's attempt to provide natural gas service was held ultra vires and void because the statutes governing the district did not authorize the district to provide such service). Such a statutory construction is consistent with the principals of constitutional avoidance. *Harrot*, 25 Cal 4th at 1138, 1153.

Significantly, in the event the language of A.B. 32 is construed to provide CARB with authority to conduct the auctions as promulgated in the Cap and Trade Regulation, both the auction provisions of the regulation *and* A.B. 32 itself are unconstitutional under California Constitution, Article XIII A, Section 3 (Proposition 13), for the reasons set forth in Section I, *supra.*

III

STATUTES ENACTED AFTER A.B. 32 CANNOT BE INTERPRETED TO AUTHORIZE CARB TO RAISE REVENUE AT AUCTION, WITHOUT VIOLATING PROPOSITION 26

On November 2, 2010, California voters approved Proposition 26, the Supermajority Vote to Pass New Taxes and Fees Act, which in relevant part amended the provisions of Proposition 13 that were designated as Article XIII

A, Section 3, of the California Constitution. Proposition 26 applies to legislation enacted after November 3, 2010. Cal Const. art. XIII A, § 3.

In passing Proposition 26, the people of the State of California declared that (1) taxes continue to rise notwithstanding requirements of Proposition 13, because new statutory levies on taxpayers have been "disguised" as regulatory fees, and (2) this poses an unreasonable burden on the taxpayers of California, requiring that the supermajority vote mandate of Proposition 13 be made more effective. Voter Information Guide, Gen. Elec. (Nov. 2, 2010) text of Prop. 26, §§ 1(a), (c), (e), (f) at p. 114.

In relevant part, Proposition 26 amended Section 3 of Article XIII A of the California Constitution to define the term "tax" as "*any* levy, charge, or exaction of *any kind* imposed by the State." Cal. Const., art. XIII A § 3(b). (Emphasis added). Moreover, Proposition 26 established that

> [t]he *State bears the burden of proving by a preponderance of the evidence* that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.

Cal. Const., art. XIII A, section 3(d). (Emphasis added.)

It is undisputed that none of the relevant statutes enacted in 2012 was passed by a supermajority vote. Those enactments purport to allocate certain revenues generated at the auctions. But if any of the 2012 enactments, either

individually or collectively, are needed to provide CARB with authority after-the-fact to generate revenues at auction from the sale of emissions allowances, they run afoul of Proposition 26 because they constitute "change[s] in state statute[s] which result[] in . . . a higher tax." Cal. Const. art. XIII A § 3(b). Accordingly, if the auctions were ultra vires before the 2012 enactments, those enactments fail to authorize the *generation* of auction revenue unless at least one of Proposition 26's seven specific exceptions applies. But none of the exceptions applies to any of the statutes.

S.B. 1018 provides that "loans" of moneys in the "Greenhouse Gas Reduction Fund" may be made to the "General Fund" "for cash flow" purposes. There is no "cash flow" exception in Proposition 26. To the extent that auctions were not authorized before S.B. 1018 was enacted, and to the extent S.B. 1018 purports to authorize the auctions after-the-fact, it constitutes the enactment of a "higher tax" without a supermajority vote. Accordingly, S.B. 1018 is void as unconstitutional under Proposition 26.

Next, A.B. 1532 directs California's Finance Department to develop a three-year Investment Plan to use the funds to reduce greenhouse gas emissions. Investments would target areas such as clean energy, low carbon transportation and infrastructure, natural resource protection, and research and development. On May 14, 2013, California issued a first installment of the Investment Plan. The Investment Plan identifies and prioritizes "[s]tate

investments to help achieve greenhouse gas reduction goals," but does not provide cost estimates of *actual* services or regulatory activity to be funded by auction revenues, which depend entirely on future actions that may or may not be taken by the Legislature. JA0736 ("Inclusion of a recommended investment in this plan does not guarantee funding."). In fact, A.B. 1532 does not come close to authorizing CARB to conduct its auctions. But if it is interpreted to do so, not one of the seven exceptions to Proposition 26 applies, as there is no exception for projects recommended to the Legislature by the Director of Finance. Accordingly, if A.B. 1532 is construed to authorize CARB's auction provisions after-the-fact, the enactment is void under Proposition 26.

In turn, S.B. 535 mandates 25% and 10% set-asides for "disadvantaged areas." It also does not meet any of the exceptions in Proposition 26, as there is no exception for "disadvantaged areas." Accordingly, to the extent S.B. 535 is required to authorize otherwise ultra vires auctions, it too constitutes the enactment of illegal taxes void under Proposition 26.

A.B. 1464 provides that the Director of Finance may allocate or otherwise use an amount of "at least" $500 million from moneys derived from the sale of greenhouse gas emission allowances. 2012 Stats., Ch. 21, § 15.11(a). If auctions were not authorized by A.B. 32, then A.B. 1464 could not be used to support CARB's authority to sell emissions allowances at auction without running afoul of Proposition 26 because there is no exception

set forth in Proposition 26 that could apply to the authorization to the Director of Finance to confiscate "at least" $500 million from the Greenhouse Gas Reduction Fund and make corresponding adjustments to the General Fund. Accordingly, to the extent A.B. 1464 is required to authorize CARB's auctions, it and the auctions are unconstitutional under Proposition 26.

The 2014 legislation fares no better, because neither S.B. 852 nor S.B. 862 passed by a two-thirds supermajority vote in both houses, and there is no exception in Proposition 26 for funding the designated projects, such as high-speed rail and affordable housing. *See* Ex. 1 hereof (vote tallies); *See also,* Statement of Facts, *supra.*

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that (1) a writ of mandate issue from this Court, enjoining Respondents from conducting further auctions of greenhouse gas emissions allowances pursuant to 17 C.C.R. §§ 95830-95834, 95870, and 95910-95914, and that (2) the Court declare that 17 C.C.R. §§ 95830-95834, 95870, and 95910-95914, violate California Constitution, Article XIII A, Section 3, Proposition 13 or Proposition 26 or, in the alternative, are ultra vires under A.B. 32.

DATED: October 17, 2014.

Respectfully submitted,

JAMES S. BURLING
THEODORE HADZI-ANTICH
HAROLD E. JOHNSON

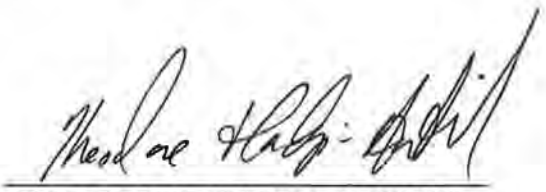
By _____
THEODORE HADZI-ANTICH

Attorneys for Petitioners-Appellants
Morning Star Packing Co., et al.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 12,762 words.

DATED: October 17, 2014.



THEODORE HADZI-ANTICH

EXHIBIT - 1

UNOFFICIAL BALLOT
MEASURE: SB 852
AUTHOR: Leno
TOPIC: Budget Act of 2014.
DATE: 06/15/2014
LOCATION: ASM. FLOOR
MOTION: SB 852 Leno Conference Report By SKINNER
(AYES 55. NOES 24.) (PASS)

AYES
****

Alejo Ammiano Bloom Bocanegra
Bonilla Bonta Bradford Brown
Buchanan Ian Calderon Campos Chau
Chesbro Cooley Dababneh Daly
Dickinson Eggman Fong Fox
Frazier Garcia Gatto Gomez
Gonzalez Gordon Gray Hall
Roger Hernández Holden Jones-Sawyer Levine
Lowenthal Medina Mullin Muratsuchi
Nazarian Pan Perea John A. Pérez
V. Manuel Pérez Quirk Quirk-Silva Rendon
Ridley-Thomas Rodriguez Salas Skinner
Stone Ting Weber Wieckowski
Williams Yamada Atkins

NOES
****

Achadjian Allen Bigelow Chávez
Conway Dahle Donnelly Beth Gaines
Gorell Grove Hagman Harkey
Jones Linder Logue Maienschein
Mansoor Melendez Nestande Olsen
Patterson Wagner Waldron Wilk

ABSENT, ABSTAINING, OR NOT VOTING
****

Vacancy

UNOFFICIAL BALLOT
MEASURE: SB 852
AUTHOR: Leno
TOPIC: Budget Act of 2014.
DATE: 06/15/2014
LOCATION: SEN. FLOOR
MOTION: Conference Reports SB852 Leno
(AYES 25. NOES 11.) (PASS)

AYES
****

Beall	Block	Cannella		Corbett
Correa	De León	Evans	Galgiani	
Hancock	Hernandez		Hill	Hueso
Jackson	Lara	Leno	Lieu	
Liu	Mitchell		Monning	Padilla
Pavley	Roth	Steinberg		Torres
Wolk				

NOES
****

Anderson		Berryhill	Fuller	Gaines
Huff	Knight	Morrell	Nielsen	
Vidak	Walters	Wyland		

NO VOTE RECORDED
****

Calderon	DeSaulnier	Wright	Yee

UNOFFICIAL BALLOT
MEASURE: SB 862
AUTHOR: Committee on Budget and Fiscal Review
TOPIC: Greenhouse gases: emissions reduction.
DATE: 06/15/2014
LOCATION: ASM. FLOOR
MOTION: SB 862 B.& F. R. Senate Third Reading By SKINNER
(AYES 53. NOES 26.) (PASS)

AYES
****

Alejo Ammiano Bloom Bocanegra
Bonilla Bonta Bradford Brown
Buchanan Ian Calderon Campos Chau
Chesbro Dababneh Daly Dickinson
Eggman Fong Fox Frazier
Garcia Gatto Gomez Gonzalez
Gordon Gray Hall Roger Hernández
Holden Jones-Sawyer Levine Lowenthal
Medina Mullin Muratsuchi Nazarian
Pan Perea John A. Pérez V. Manuel Pérez
Quirk Quirk-Silva Rendon Ridley-Thomas
Rodriguez Skinner Stone Ting
Weber Wieckowski Williams Yamada
Atkins

NOES
****

Achadjian Allen Bigelow Chávez
Conway Cooley Dahle Donnelly
Beth Gaines Gorell Grove Hagman
Harkey Jones Linder Logue
Maienschein Mansoor Melendez Nestande
Olsen Patterson Salas Wagner
Waldron Wilk

ABSENT, ABSTAINING, OR NOT VOTING
****

Vacancy

UNOFFICIAL BALLOT
MEASURE: SB 862
AUTHOR: Committee on Budget and Fiscal Review
TOPIC: Greenhouse gases: emissions reduction.
DATE: 06/15/2014
LOCATION: SEN. FLOOR
MOTION: Unfinished Supp 1 SB862 Committee on B. & F.R. (Leno) Concurrence
(AYES 22. NOES 12.) (PASS)

AYES
****

Beall	Block	Corbett	Correa	
De León	Evans	Galgiani		Hancock
Hernandez		Hill	Hueso	Jackson
Lara	Leno	Lieu	Liu	
Mitchell		Monning	Padilla	Steinberg
Torres	Wolk			

NOES
****

Anderson		Berryhill	DeSaulnier	Fuller
Gaines	Huff	Knight	Morrell	
Nielsen	Vidak	Walters	Wyland	

NO VOTE RECORDED
****

Calderon		Cannella	Pavley	Roth
Wright	Yee			

DECLARATION OF SERVICE

I, Pamela Spring, 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 October 17, 2014, true copies of APPELLANTS' OPENING BRIEF were placed in envelopes addressed to:

Kamala D. Harris
Attorney General of California
Office of the Attorney General
P.O. Box 70550
Oakland, CA 94612-0550

David Alexander Zonana
Supervising Deputy Attorney General
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Matthew Dwight Zinn
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 17th day of October, 2014, at Sacramento, California.

PAMELA SPRING