

S224779

S _____

Exempt from Filing Fees
Government Code § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Citizens for Fair REU Rates, et al.
Plaintiffs and Appellants

vs.

City of Redding, et al.
Defendants and Respondents.

SUPREME COURT
FILED

MAR 3 - 2015

Fee Fighter LLC, et al.
Plaintiffs and Appellants

vs.

City of Redding, et al.
Defendants and Respondents.

Frank A. McGuire Clerk

Deputy

**MOTION FOR JUDICIAL NOTICE
IN SUPPORT OF PETITION FOR REVIEW
VOLUME I OF III**

Of a Published Decision of the
Third Appellate District, Case No. C071906

Reversing a Judgment of the Superior Court of
the State of California for the County of Shasta,
Case No. 171377 (Consolidated with Case No. 172960)
Honorable William D. Gallagher, Judge Presiding

*MICHAEL G. COLANTUONO (143551)

MColantuono@chwlaw.us

AMY C. SPARROW (191597)

ASparrow@chwlaw.us

MICHAEL R. COBDEN (262087)

MCobden@chwlaw.us

COLANTUONO, HIGHSMITH & WHATLEY, PC

11364 Pleasant Valley Road

Penn Valley, California 95946-9000

Telephone: (530) 432-7357

Facsimile: (530) 432-7356

Attorneys for Respondent City of Redding

TABLE OF AUTHORITIES

Page(s)

Cases

Lockley v. Law Office of Cantrell, Green, et al.
(2001) 91 Cal.App.4th 875.....1, 2

Statutes

Evidence Code

§ 4521, 2
§ 452, subd. (d)1
§ 452, subd. (h)1, 2
§ 453, subd. (b)1
§ 4591
§ 459, subd. (a).....1

Rules

California Rules of Court, rule 8.2521

**To the Honorable Chief Justice and Associate Justices of the
Supreme Court of the State of California:**

Pursuant to California Rules of Court, rule 8.252, California Evidence Code section 452, subds. (d) and (h), and section 459; Petitioner City of Redding hereby moves this Court to take judicial notice of the documents attached hereto as Exhibits A through H:

- A. Appellant's Opening Brief in *California Chamber of Commerce v. California Air Resources Board*, Third District Court of Appeal Case No. C075930
- B. Appellant's Opening Brief in *Morning Star Packing Co. v. California Air Resources Control Board*, Third District Court of Appeal Case No. C075954
- C. 2nd Amended Complaint in *Bauer v. Harris*, E.D. Cal. Case No. 11 CV 01440
- D. Appellant's Opening Brief in *Capistrano Taxpayers Assn. v. City of San Juan Capistrano*, Fourth District Court of Appeal Case No. G048969
- E. Complaint in *Glendale Coalition for Better Government v. City of Glendale*, Los Angeles County Superior Court Case No. BS153253
- F. Complaint in *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority*, San Diego Superior Court Case No. 37-2014-00029611-CM-MC-CTL

G. Respondent's Brief in *City of San Buenaventura v. United Water Conservation District*, Second District Court of Appeal Case No. B251810

H. Amicus Brief in *Great Oaks Water Co. v. Santa Clara Valley Water District*, Sixth District Court of Appeal Case No. H035260

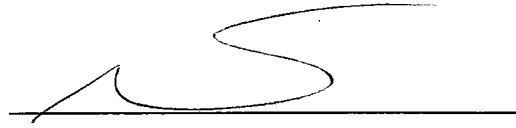
These materials are relevant to the Petition because they demonstrate the statewide significance of the issues presented in this case. Exhibits A through H show that lower courts are grappling with the very questions raised here, and will look to the Court of Appeal's published Opinion in this case for guidance. These materials also demonstrate that this Court should grant review to provide such guidance.

The above-listed materials were not presented to the trial court because they are relevant only to the unique questions presented in the Petition for Review.

This motion is based on the attached Memorandum of Points and Authorities, Declaration of Michael R. Cobden, and Exhibits A through H attached thereto, the complete records and files of this Court, and the accompanying proposed order granting this motion.

DATED: March 2, 2015

**COLANTUONO HIGHSMITH &
WHATLEY, PC**

A handwritten signature in black ink, appearing to read 'M. G. Colantuono', is written above a solid horizontal line.

MICHAEL G. COLANTUONO

AMY C. SPARROW

MICHAEL R. COBDEN

Attorneys for Respondent

City of Redding

MEMORANDUM OF POINTS AND AUTHORITIES

I. JUDICIAL NOTICE OF BRIEFS AND PLEADINGS IN CASES PENDING IN LOWER COURTS IS APPROPRIATE TO ESTABLISH THE SIGNIFICANCE OF A LEGAL QUESTION PRESENTED FOR REVIEW

A. General Principles of Judicial Notice

A reviewing court may take judicial notice of any matter specified in Evidence Code section 452. (Evid. Code § 459.) Pursuant to Evidence Code section 452, subdivision (d) this Court may notice “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.” The Court may also notice “facts ... that are not reasonably subject to dispute.” (Evid. Code § 452, subd. (h).) Judicial notice of such facts are mandatory in the trial court upon request where the opposing party is permitted to raise objections and the court has enough information about the facts to make a determination that they come within a category subject to notice. (Evid. Code § 453, subd. (b).) A reviewing court is permitted to notice facts just as is a trial court. (Evid. Code § 459, subd. (a).)

“Judicial notice is the recognition and acceptance by the court, for use ... by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.” (*Lockley v. Law Office of Cantrell, Green, et al.* (2001) 91 Cal.App.4th 875, 882, citations and quotations omitted.) “The

underlying theory of judicial notice is that the matter being judicially noticed is a law or fact that is **not reasonably subject to dispute.**"

(Ibid., original emphasis; Evid. Code § 452, subd. (h).)

B. The Court Should Notice Pleadings and Briefings from Pending State and Federal Cases

The Court should judicially notice Exhibits A through H of the Colantuono Declaration as documents duly filed in California Superior Courts, the Court of Appeal, or the United States District Court for the Eastern District of California. These documents are court records falling directly within subdivision (d) of Evidence Code section 452. Furthermore, they are documents not reasonably subject to dispute. (Evid. Code § 452, subd. (h).)

Respondent does not ask this Court to notice these documents for the truth of any fact stated within them, but for the proposition that the litigants and courts involved in those cases are grappling with the same or similar issues raised in this case. These documents are therefore relevant to the issues raised in the Petition for Review, and should be noticed in consideration of that Petition.

CONCLUSION

The City respectfully requests this Court grant Respondent's motion to notice Exhibits A–H and consider them in support of its Petition for Review.

DATED: March 2, 2015

**COLANTUONO, HIGHSMITH &
WHATLEY, PC**

A handwritten signature in black ink, appearing to read 'M. G. Colantuono', written above a horizontal line.

MICHAEL G. COLANTUONO
AMY C. SPARROW
MICHAEL R. COBDEN
Attorneys for Respondent
City of Redding

DECLARATION OF MICHAEL R. COBDEN
[Cal. Rules of Court, rule 8.54, subdivision (a)(2)]

1. I am an attorney in good standing licensed to practice before the courts of this state and counsel of record for Petitioner City of Redding in this matter.

2. Attached hereto as Exhibit A is a true and correct copy of the Opening Brief of Appellant National Association of Manufacturers in *California Chamber of Commerce v. California Air Resources Board*, Third District Court of Appeal Case No. C075930. I obtained this document from the Appellant's website on February 27, 2015 at the following address:

[http://www.nam.org/Advocacy/The-Center-for-Legal-Action/Briefs-Online/2014/NAM-Opening-Brief-in-California-Chamber-of-Commerce-v-California-Air-Resources-Board-\(Cal-Ct-App\)/](http://www.nam.org/Advocacy/The-Center-for-Legal-Action/Briefs-Online/2014/NAM-Opening-Brief-in-California-Chamber-of-Commerce-v-California-Air-Resources-Board-(Cal-Ct-App)/)

3. Attached hereto as Exhibit B is a true and correct copy of the Appellant's Opening Brief in *Morning Star Packing Co. v. California Air Resources Control Board*, Third District Court of Appeal Case No. C075954. I obtained this document from the Pacific Legal Foundation's website on February 27, 2015 at the following address:
<http://www.pacificlegal.org/document.doc?id=1689>

4. Attached hereto as Exhibit C is a true and correct copy of the Second Amended Complaint in *Bauer v. Harris*, E.D. Cal. Case No. 11 CV 01440. I obtained this document from Plaintiffs' counsel's

website on February 27, 2015 at the following address:

http://michellawyers.com/wp-content/uploads/2011/08/Bauer-v.-Harris_Conformed-Second-Amended-Complaint-for-Declaratory-and-Injunctive-Relief.pdf.

5. Attached hereto as Exhibit D is a true and correct copy of Appellant's Opening Brief in *Capistrano Taxpayers Assn. v. City of San Juan Capistrano*, Fourth District Court of Appeal Case No. G048969, which I obtained from my firms' files as we are Appellant's counsel there.

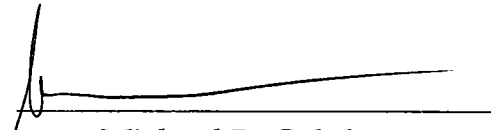
6. Attached hereto as Exhibit E is a true and correct copy of Complaint in *Glendale Coalition for Better Government v. City of Glendale*, Los Angeles County Superior Court Case No. BS153253, which I obtained from my firm's files as we are Respondent's counsel there.

7. Attached hereto as Exhibit F is a true and correct copy of the Complaint in *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority*, San Diego County Superior Court Case No. 37-2014-00029611-CM-MC-CTL, which I obtained via the San Diego Superior Court's website.

8. Attached hereto as Exhibit G is a true and correct copy of Respondent's Brief in *City of San Buenaventura v. United Water Conservation District*, Second District Court of Appeal Case No. B251810, which I obtained from my firm's files as we are counsel for Respondent there.

9. Attached hereto as Exhibit H is a true and correct copy of Amicus Brief in *Great Oaks Water Co. v. Santa Clara Valley Water District*, Sixth District Court of Appeal Case No. H035260, which I obtained from my firm's files, as we obtained it from counsel for Amici there.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 2nd day of March 2015.



Michael R. Cobden

[Proposed]

**ORDER TAKING JUDICIAL NOTICE OF
DOCUMENTS**

Good cause appearing, IT IS HEREBY ORDERED that Respondent City of Redding's Motion Requesting Judicial Notice is granted. IT IS ORDERED that this Court shall take judicial notice of the following:

- A. Appellant National Association of Manufacturers' Opening Brief in *California Chamber of Commerce v. California Air Resources Board*, Third District Court of Appeal Case No. C075930
- B. Appellant's Opening Brief in *Morning Star Packing Co. v. California Air Resources Control Board*, Third District Court of Appeal Case No. C075954
- C. 2nd Amended Complaint in *Bauer v. Harris*, E.D. Cal. Case No. 11 CV 01440
- D. Appellant's Opening Brief in *Capistrano Taxpayers Assn. v. City of San Juan Capistrano*, Fourth District Court of Appeal Case No. G048969
- E. Complaint in *Glendale Coalition for Better Government v. City of Glendale*, Los Angeles County Superior Court Case No. BS153253

- F. Complaint in *Sweetwater Authority Ratepayers Association, Inc. v. Sweetwater Authority*, San Diego County Superior Court Case No. 37-2014-00029611-CM-MC-CTL
- G. Respondent's Brief in *City of San Buenaventura v. United Water Conservation District*, Second District Court of Appeal Case No. B251810
- H. Amicus Brief in *Great Oaks Water Co. v. Santa Clara Valley Water District*, Sixth District Court of Appeal Case No. H035260.

DATED: _____

By: _____
Chief Justice Tani Cantil-Sakauye

EXHIBIT A

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

CALIFORNIA CHAMBER OF COMMERCE, *et al.*,

Appellants,

v.

CALIFORNIA AIR RESOURCES BOARD, *et al.*,

Respondents.

On Appeal from the Superior Court of California
County of Sacramento, Hon. Timothy M. Frawley
Nos. 34-2012-80001313, 34-2012-80001464

**OPENING BRIEF OF APPELLANT
THE NATIONAL ASSOCIATION OF MANUFACTURERS**

*Sean A. Commons
State Bar No. 217603
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
Telephone: (213) 896-6010
Facsimile: (213) 896-6600
Email: scommons@sidley.com

Roger R. Martella, Jr. (*pro hac vice*)
Paul J. Zidlicky (*pro hac vice*)
Eric D. McArthur (*pro hac vice*)
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
Telephone: (202) 736-8000
Facsimile: (202) 736-8711
Email: pzidlicky@sidley.com

Counsel for The National Association of Manufacturers

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule 8.208, I certify that no party or entity has a 10% or greater ownership interest in The National Association of Manufacturers, and no other person or entity has a financial or other interest in the outcome of the proceeding within the meaning of Rule 8.208(e)(2).



Sean A. Commons
State Bar No. 217603
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
Telephone: (213) 896-6010
Facsimile: (213) 896-6600
Email: scommons@sidley.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTRODUCTION..... 1

STATEMENT OF THE CASE..... 3

 A. The California Constitution 3

 B. The Global Warming Solutions Act of 2006 (“AB 32”) 4

 C. The Board’s Cap-and-Trade Regulation Proposal..... 6

 D. Cap-and-Trade Final Statement of Reasons 8

 E. The Cap-and-Trade Regulation..... 10

 F. The Cap-and-Trade Fee Regulation..... 13

 G. Post-AB 32 Legislation..... 14

 H. The Decision Below..... 15

STANDARD OF REVIEW 17

ARGUMENT 18

 I. AB 32 Does Not Authorize The Board To Raise Billions In Excess
 Revenue By Auctioning And Selling Allowances..... 18

 A. AB 32’s Text, Structure, Purpose, and Legislative History Show
 That ARB Lacks Authority To Raise Revenue By Auctioning And
 Selling Allowances..... 19

 B. AB 32 Must Be Construed To Avoid Constitutional Doubt. 31

 II. If AB 32 Is Construed To Authorize ARB To Raise Revenue By
 Auctioning And Selling GHG Emission Allowances, Then It
 Imposes An Unconstitutional Tax..... 34

 A. A Regulatory Charge That Fails To Satisfy The Requirements Of
 Sinclair Paint Is A Tax..... 36

B. Under *Sinclair Paint*, The Allowance Charges Are An
Unconstitutional Tax..... 38

CONCLUSION..... 56

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AFL v. Unemployment Ins. Appeals Bd.</i> (1996) 13 Cal.4th 1017	20, 21
<i>Ailanto Props., Inc. v. City of Half Moon Bay</i> (2006) 142 Cal.App.4th 572	24, 25
<i>Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization</i> (1978) 22 Cal.3d 208	35
<i>Association for Retarded Citizens v. Department of Developmental Services</i> (1985) 38 Cal.3d 384	33, 34
<i>B.C. Cotton, Inc. v. Voss</i> (1995) 33 Cal.App.4th 929	22
<i>Beaumont Investors v. Beaumont-Cherry Valley Water Dist.</i> (1985) 165 Cal.App.3d 227.....	35, 41, 42
<i>Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game</i> (2000) 79 Cal.App.4th 935	45
<i>Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.</i> (2009) 178 Cal.App.4th 120	45
<i>Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.</i> (2011) 51 Cal.4th 421	<i>passim</i>
<i>Cal. Redevelopment Ass'n v. Matosantos</i> (2011) 53 Cal.4th 231	2, 24
<i>Cal. State Employees' Ass'n. v. State</i> (1973) 32 Cal.App.3d 103.....	25
<i>Citizens to Save Cal. v. FPPC</i> (2006) 145 Cal.App.4th 736	18
<i>Clayworth v. Pfizer, Inc.</i> (2008) 165 Cal.App.4th 209	24

<i>Collier v. City & Cnty. of San Francisco</i> (2007) 151 Cal.App.4th 1326	45
<i>Crowell v. Benson</i> (1932) 285 U.S. 22	32
<i>Del Costello v. State</i> (1982) 135 Cal.App.3d 887	30
<i>Diageo-Guinness USA, Inc. v. State Board of Equalization</i> (2012) 205 Cal.App.4th 907	21
<i>Dyna-Med, Inc. v. Fair Emp't & Hous. Comm'n</i> (1987) 43 Cal.3d 1379	<i>passim</i>
<i>Equilon Enters. v. State Bd. of Equalization</i> (2010) 189 Cal.App.4th 865	48
<i>Estate of Cirone v. Corey</i> (1987) 189 Cal.App.3d 1280	25
<i>Garcia v. McCutchen</i> (1997) 16 Cal.4th 469	24
<i>Griffith v. City of Santa Cruz</i> (2012) 207 Cal.App.4th 982	41, 45
<i>Harrott v. Cnty. of Kings</i> (2001) 25 Cal.4th 1138	31, 32
<i>In re Att'y Discipline Sys.</i> (1998) 19 Cal.4th 582	20, 25
<i>In re Christian S.</i> (1994) 7 Cal.4th 768	2
<i>Morning Star Co. v. Bd. of Equalization</i> (2011) 201 Cal.App.4th 737	53, 54
<i>Myers v. Philip Morris Cos.</i> (2002) 28 Cal.4th 828	33
<i>Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.</i> (2008) 159 Cal.App.4th 841	35, 41, 51

<i>Pennell v. City of San Jose</i> (1986) 42 Cal.3d 365	45
<i>People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.</i> (2005) 37 Cal.4th 707	30
<i>Peralta Cmty. Coll. Dist. v. Fair Emp't & Hous. Comm'n</i> (1990) 52 Cal.3d 40	<i>passim</i>
<i>Perkey v. Dep't of Motor Vehicles</i> (1986) 42 Cal.3d 185	33
<i>Sinclair Paint Co. v. State Board of Equalization</i> (1997) 15 Cal.4th 866	<i>passim</i>
<i>State Bldg. & Constr. Trades Council v. Duncan</i> (2008) 162 Cal.App.4th 289	24
<i>Tomra Pac., Inc. v. Chiang</i> (2011) 199 Cal.App.4th 463	36
<i>United Farm Workers of Am. v. Agric. Labor Relations Bd.</i> (1995) 41 Cal.App.4th 303	22, 30
<i>United States ex rel. Att'y Gen. v. Delaware & Hudson Co.</i> (1909) 213 U.S. 366	33
<i>Whitman v. Am. Trucking Ass'ns, Inc.</i> (2001) 531 U.S. 457	24
<i>Wildlife Alive v. Chickering</i> (1976) 17 Cal.3d 190	22

STATUTES

42 U.S.C. § 7651o	26
Gov't Code § 16428.8	14
Cal. Const., art. XIII A, § 3	3, 4, 39
Health & Safety Code § 38510	4
Health & Safety Code § 38530	4
Health & Safety Code § 38550	5, 49

Health & Safety Code § 38560	5
Health & Safety Code § 38561	23
Health & Safety Code § 38562	5
Health & Safety Code § 38570	5
Health & Safety Code § 38580	11
Health & Safety Code § 38597	<i>passim</i>
Health & Safety Code § 39612	27
Health & Safety Code § 39613	27
Health & Safety Code § 39711.....	14
Health & Safety Code § 39712	14, 53
Health & Safety Code § 57001	5, 6, 22
Health & Safety Code § 105310	44

OTHER AUTHORITIES

40 C.F.R. § 73.27	26
17 CCR § 95200.....	13
17 CCR § 95201.....	13
17 CCR § 95203.....	14, 22, 40
17 CCR § 95802.....	10
17 CCR § 95811.....	10, 54
17 CCR § 95812.....	10, 54
17 CCR § 95840.....	11
17 CCR § 95841.....	11
17 CCR § 95850.....	10
17 CCR § 95851.....	11

17 CCR §§ 95855–56.....	10
17 CCR § 95870.....	10, 11, 13, 51
17 CCR § 95890.....	11
17 CCR § 95891.....	11
17 CCR § 95892.....	11
17 CCR § 95910.....	10, 11, 12
17 CCR § 95911.....	10, 11, 12
17 CCR § 95912.....	10, 11
17 CCR § 95913.....	10, 11, 12, 13
17 CCR § 95914.....	10, 11
17 CCR §§ 96013–14.....	11
ARB, Staff Report: Initial Statement of Reasons, Proposed Regulation to Implement the California Cap-and-Trade Program (“ISOR”).....	<i>passim</i>
ARB, Final Statement of Reasons for Rulemaking, California’s Cap- and-Trade Program (“FSOR”).....	<i>passim</i>

INTRODUCTION

The National Association of Manufacturers (“the NAM”) submits this brief challenging the decision of the Superior Court (Frawley, J.) upholding regulations adopted by the California Air Resources Board (“ARB” or “Board”), establishing auctions and reserve sales for greenhouse gas (“GHG”) emission allowances that are projected to generate revenues of between \$12 and \$70 billion over and above the regulatory fees separately collected to implement and enforce Assembly Bill 32 (“AB 32”).

The issues presented are:

- (i) Whether AB 32 authorizes the Board’s regulations providing for the sale of GHG allowances at auctions and reserve sales to generate billions of dollars in revenues for the State; and
- (ii) If AB 32 provides that authorization, whether AB 32 violates the California Constitution because it imposes a tax that was not adopted by a two-thirds supermajority of the California Legislature.

I. AB 32 does not authorize the Board to generate billions of dollars in revenues over and above the regulatory fees separately authorized and collected to implement and enforce AB 32. The language, structure, purpose, and legislative history of AB 32 all confirm that the Board is not authorized to generate such extraordinary revenues—the largest of any environmental program in the United States. AB 32 nowhere grants such

wide-ranging authority, but is instead structured to grant the Board carefully circumscribed authority to collect regulatory fees that are necessary to implement and enforce AB 32. Given that express, but limited, grant of authority to collect regulatory fees, the authorization to collect billions in additional revenues is not, as the court below concluded, a “detail” that the Legislature implicitly intended the Board to “fill up.” (JA 1573, 1575.) As the California Supreme Court has explained, the “drafters of legislation do not ... hide elephants in mouseholes.” (*Cal. Redevelopment Ass’n v. Matosantos* (2011) 53 Cal.4th 231, 260–61.) Contrary to the Superior Court’s conclusion, the Legislature would not “have silently, or at best obscurely, decided so important ... a public policy matter and created a significant departure from the existing law.” (*In re Christian S.* (1994) 7 Cal.4th 768, 782.) Indeed, even if AB 32 could be viewed as ambiguous on this issue, California law *requires* the statute to be construed to *avoid* the need to resolve serious constitutional questions presented by the lower court’s construction of AB 32.

II. The Superior Court’s construction of AB 32 to authorize the Board to generate billions in revenues through auctions and reserve sales renders AB 32 unconstitutional because the collection of such revenues is an unlawful tax adopted under a statute passed without the necessary two-thirds supermajority of the Legislature. Under the three-part test set forth by

the Supreme Court in *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866—which respondents did not even attempt to satisfy below—the allowance revenues are unconstitutional taxes. *First*, the allowance revenues vastly exceed the amount necessary to implement and enforce AB 32, which is already fully funded through a separate statutory provision expressly authorizing the collection of regulatory fees. *Second*, there has been *no* showing that the relationship between the revenues generated and the regulatory burden imposed by the regulated parties' operations is reasonable. *Third*, the primary purpose of a program projected to generate tens of billions in revenues is undoubtedly revenue generation. That conclusion is inescapable where, as here, those revenues (i) are not necessary to meet the GHG reduction goals of the Cap-and-Trade Program or to implement or enforce AB 32, and (ii) have been set aside to fund programs that have not yet been identified.

STATEMENT OF THE CASE

A. The California Constitution

In 1978, California voters adopted Proposition 13, which provides that “any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto ... must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature.” (Cal. Const., art. XIII A, § 3.) Under Proposition 13, the

California Constitution requires a supermajority vote of each house of the Legislature before a new tax can take effect. This constitutional provision was in effect when the Legislature enacted AB 32.¹

B. The Global Warming Solutions Act of 2006 (“AB 32”)

In 2006, the Legislature enacted AB 32, which was passed by 59% of the Assembly and 58% of the Senate, less than two-thirds of all the members of either house of the Legislature. (JA 1578.)

AB 32 designates ARB as the “state agency charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming in order to reduce emissions of greenhouse gases.” (Health & Safety Code § 38510.) It further directs ARB to “adopt regulations to require the reporting and verification of statewide greenhouse gas emissions and to monitor and enforce compliance with this program,” (*id.* § 38530(a)), and requires ARB to “determine what the statewide greenhouse gas emissions level was in 1990, and approve ... a statewide

¹ In 2010, California voters amended Article XIII A of the California Constitution by approving Proposition 26. Proposition 26 provides that, after January 1, 2010, subject to certain exceptions, “[a]ny change in state statute which results in any taxpayer paying a higher tax must be imposed by an act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature.” Under Proposition 26, the definition of “tax” includes “any levy, charge, or exaction of any kind imposed by the State,” with specified exceptions. (Cal. Const., art. XIII A, § 3(a)–(b).)

greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020.” (*Id.* § 38550.)

AB 32 states that ARB may “adopt rules and regulations ... to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions from sources or categories of sources, subject to the criteria and schedules set forth in this part.” (*Id.* § 38560.) Further, AB 32 authorizes ARB to include “market-based compliance mechanisms to comply with the regulations.” (*Id.* § 38570.) AB 32 *limits* that authority, however, by requiring that ARB “[d]esign the regulations, including distribution of emissions allowances where appropriate, in a manner that is equitable, seeks to minimize costs and maximize the total benefits to California, and encourages early action to reduce greenhouse gas emissions.” (*Id.* § 38562(b)(1).)

Finally, AB 32 requires ARB to “adopt by regulation, after a public workshop, a schedule of fees to be paid by the sources of greenhouse gas emissions regulated pursuant to [AB 32], consistent with Section 57001.” (*Id.* § 38597.) Section 57001, in turn, ensures that “that the amount of each fee is not more than is reasonably necessary to fund the efficient operation of the activities or programs for which the fee is assessed.” (*Id.* § 57001(a).) The “revenues collected” under § 38597 must be “deposited into the Air

Pollution Control Fund and are available upon appropriation, by the Legislature, for purposes of carrying out [AB 32].” (*Id.*)

C. The Board’s Cap-and-Trade Regulation Proposal

On October 28, 2010, ARB issued a proposed regulation to establish a Cap-and-Trade Program. The proposed Cap-and-Trade Program would require certain industrial and utility sources of GHGs to acquire, and later surrender to ARB, an “allowance” for every metric ton of CO₂e they emitted during multi-year compliance periods. (*See* ARB, Staff Report: Initial Statement of Reasons, Proposed Regulation to Implement the California Cap-and-Trade Program (“ISOR”) ES-2.) ARB proposed to reduce, over time, the total number of allowances available for each compliance period, thereby reducing the total level of GHGs that could be lawfully emitted in California by these regulated industries. (*Id.* at ES-3.) ARB acknowledged that the method of allocating allowances does not affect the amount of GHG reductions achieved because “[t]he limit on GHG emissions—the program ‘cap’—determines the environmental effectiveness of the cap-and-trade program.” (*Id.*) ARB’s analysis was confirmed by the Legislative Analyst’s Office (“LAO”). “[A]n allowance auction is not necessary to meet the AB 32 goal of reducing GHG emissions statewide to 1990 levels by 2020,” the LAO concluded, “because it is the declining cap on emissions that will reduce the state’s overall level

of GHGs—not the manner in which allowances are introduced into the market.” (JA 499.)

Under its proposal, ARB would grant, without charge, some allowances to entities regulated by Cap-and-Trade, and sell some allowances at public auctions and set-price reserve sales payable to the State of California. *Id.* ARB did not propose that the revenues collected be used to implement or enforce AB 32. Instead, ARB proposed that auction revenues be appropriated by the Legislature to “use the revenue for public benefit” by, for example, (i) redistributing allowance proceeds from fuel suppliers directly to consumers to help offset the higher fuel costs that would be passed along to consumers, (ii) funding a “Community Benefit Fund,” and (iii) establishing a competitive grant program to invest in projects like research into low-GHG technologies or workforce training. (*Id.* at II-29–II-30.²)

² In Board Resolution 10-42, adopted on December 16, 2010, ARB recommended the use of “allowance value,” *i.e.*, revenue generated from the auction and sale of allowances, to finance public and private investments oriented toward (i) “green job training,” (ii) “economic opportunities and environmental improvements in disadvantaged communities,” (iii) “adaptation to climate change,” and (iv) “low-cost GHG emissions reductions, including investments in energy efficiency, public transit, transportation and land-use planning, and research, development, and deployment.” (JA 419–20.) ARB also recommended that allowance revenues be “[r]eturn[ed] ... to households either through lump-sum rebates ... or through cuts or avoided increases in the State’s individual income or sales tax rates.” (JA 420.)

D. Cap-and-Trade Final Statement of Reasons

Commenters objected that ARB's "proposal to raise funds via an auction for reasons outside of administrative fee purposes is beyond [ARB]'s regulatory authority." (ARB, Final Statement of Reasons for Rulemaking, California's Cap-and-Trade Program ("FSOR") 731.) Commenters explained that the auction revenue proposals were "contrary to the legislative intent of AB 32," (*id.*), and that "an auction and its proceeds are not only unauthorized by AB 32, but equate to a tax that will require 2/3 vote of the legislature." (*Id.* at 723.) In response, ARB admitted that AB 32 "does not direct ARB to use any particular method to distribute allowances, and does not specify that some methods are allowed and others are not," but insisted that "the Legislature did not intend to forbid ARB from choosing this widely recognized distribution method." (*Id.* at 732.)

Further, ARB stated that while "[t]here are a variety of ways to allocate allowances," auctioning is "the method that has been recommended by the Market Advisory Committee and many other economists." (*Id.*) The Market Advisory Committee explained that "[t]he method by which emission allowances are distributed under a cap-and-trade program does not affect the total greenhouse gas emissions under the program, but will affect the distribution of economic costs associated with meeting California's greenhouse gas emission targets." (ISOR, App. H, at H-9.) The Committee