

In the Court of Appeal for the State of California

Third Appellate District

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CALIFORNIA CHAMBER OF COMMERCE, et al.,	) No. C075930
	) (Sacramento Sup. Ct.
Plaintiffs and Appellants,	) No. 34201280001313)
vs.	)
CALIFORNIA AIR RESOURCES BOARD, et al.,	)
	)
Defendants and Respondents.	)
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MORNING STAR PACKING COMPANY, et al.,	) No. C075954
	) (Sacramento Sup. Ct.
Plaintiffs and Appellants,	) No. 34201380001464)
vs.	)
CALIFORNIA AIR RESOURCES BOARD, et al.,	)
	)
Defendants and Respondents.	)
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**APPLICATION FOR PERMISSION TO FILE  
AN AMICUS CURIAE BRIEF  
and  
BRIEF OF AMICUS CURIAE CALIFORNIA TAXPAYERS  
ASSOCIATION IN SUPPORT OF APPELLANTS**

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No. 34201380001464)

**APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE  
BRIEF**

To the Honorable Vance W. Raye, Presiding Justice, and to the  
Honorable Associate Justices of the Court of Appeal of the State of  
California, Third Appellate District:

Pursuant to Rule 8.200(c) of the California Rules of Court, the  
California Taxpayers Association ("CalTax") respectfully requests  
permission to file the attached amicus brief in support of appellants.

Counsel for CalTax are familiar with the questions involved and the scope of their presentation to this Court, and believe there is necessity for additional argument. The attached brief demonstrates that:

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1. The California Supreme Court's decision in *Sinclair Paint Co. v. State Bd. Of Equalization*, 15 Cal.4<sup>th</sup> 866 (1997), identifies important limitations under Proposition 13 on the State's ability to impose fees.

2. The limitations identified in *Sinclair Paint* should apply where, as here, the State asserts that it is imposing a fee under its police power.

3. The auction and sale of allowances by the California Air Resources Board ("ARB") violate the *Sinclair Paint* limitations, as appellants have shown. Most notably, recent action by the Legislature confirms that ARB's auction and sale of allowances is for the primary purpose of generating revenue, and there is no reasonable nexus between fee-payers and the programs to be funded by the revenue from the auction and sale of allowances.

CalTax is a nonprofit, nonpartisan research and advocacy association founded in 1926 with a dual mission: to guard against unnecessary taxes and promote government efficiency. CalTax educates and represents the interests of its members, and the taxpayers at large, in the areas of income and franchise, property, sales and use, and other state and local taxes, assessments, fees and penalties. CalTax's membership includes many

businesses across all industries, ranging from small firms to Fortune 500 companies. CalTax is dedicated to the uniform and equitable administration of taxes and minimizing the cost of tax administration and compliance. In this case, CalTax is interested in defining and preserving Proposition 13's limitations on the State's ability to impose fees, as set forth by the California Supreme Court in *Sinclair Paint*, and related court cases.

Since the passage of Proposition 13 in 1978, CalTax has had a strong interest in the evolving definitions of taxes and fees. CalTax participated as amicus curiae before the California courts on post-Proposition 13 cases on the meaning of the term "tax," and made its views known to the Legislature on the constitutional constraints on the collection of revenue by the State from the auction and sale of greenhouse gas emission allowances. Accordingly, CalTax has strong interest in the issues of whether the important limitations identified in *Sinclair Paint* apply where, as here, the State asserts it is imposing a fee under its police power, and whether those limitations are violated by the auction and sale of allowances by ARB.

The issues presented in this appeal are of great importance to CalTax since the trial court's decision could open the door to "fees" that could affect every taxpayer in California, contrary to the decisions of the appellate courts under Proposition 13 and related provisions of the California Constitution. The issues presented in this appeal are issues in

which CalTax has specialized expertise. CalTax can provide this Court with a perspective different from that of the parties, particularly regarding the broader impact of this case on the proper application of *Sinclair Paint* to limit the State's ability to impose fees, especially where the State asserts that it is imposing a fee under its police power.

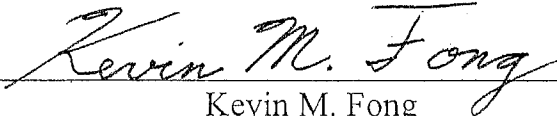
Pursuant to Rule 8.200(c)(3) of the California Rules of Court, CalTax states that (1) there is no party in the pending appeal who authored the proposed amicus brief in whole or in part; (2) there is no party or counsel for any party who made a monetary contribution intended to fund the preparation or submission of the brief; and (3) no other person or entity, other than the amicus curiae, its members or its counsel, made a monetary contribution intended to fund the brief.

For the reasons stated above, amicus curiae CalTax respectfully requests permission to file the attached amicus brief.

Dated: May 15, 2015.

Respectfully submitted,

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**BRIEF OF AMICUS CURIAE CALIFORNIA TAXPAYERS  
ASSOCIATION IN SUPPORT OF APPELLANTS**

**INTRODUCTION**

Amicus curiae, California Taxpayers Association ("CalTax"),

submits that there is need for the additional argument in this brief on the following points:



1. The California Supreme Court's decision in *Sinclair Paint Co. v. State Bd. Of Equalization*, 15 Cal.4<sup>th</sup> 866 (1997), identifies important limitations under Proposition 13 on the State's ability to impose fees.

---

2. The limitations identified in *Sinclair Paint* should apply where, as here, the State asserts that it is imposing a fee under its police power.

3. The auction and sale of allowances by the California Air Resources Board ("ARB") violate the *Sinclair Paint* limitations, as appellants have shown. Most notably, recent action by the Legislature confirms that ARB's auction and sale is for the primary purpose of generating revenue, and there is no reasonable nexus between fee-payers and the programs to be funded by the auction revenue and sale of allowances.

## ARGUMENT

### I. THE CALIFORNIA SUPREME COURT'S DECISION IN *SINCLAIR PAINT* IDENTIFIES IMPORTANT LIMITATIONS UNDER PROPOSITION 13 ON THE STATE'S ABILITY TO IMPOSE FEES.

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In *Sinclair Paint* and subsequent cases, the California Supreme Court and Court of Appeal have identified important limitations under

Proposition 13 on the State's ability to impose fees.<sup>1</sup> If the limitations articulated in *Sinclair Paint* are not met, a fee will be considered a tax under Proposition 13 and must be approved by a two-thirds majority of the Legislature for it to be permissible. See Cal. Const., former art XIII A, § 3.

**Fees may not be imposed for the purpose of generating revenue, unrelated to regulation.** A fee may not be imposed “for unrelated revenue purposes” under *Sinclair Paint*, 15 Cal.4<sup>th</sup> at 876; see *Northwest Energetic Services, LLC v. California Franchise Tax Board*, 159 Cal.App.4<sup>th</sup> 841, 855 (2008). “What a fee cannot do is exceed the reasonable cost of regulation with the generated surplus used for general revenue collection. An excessive fee that is used to generate general revenue becomes a tax.” *Morning Star*, 201 Cal.App.4<sup>th</sup> at 751; quoting *California Farm Bureau Federation v. State Water Resources Control Bd.*, 51 Cal.4<sup>th</sup> 421, 438 (2011).

**Fees must have a nexus to the payer.** There must be “a causal connection or nexus” between the fee-payer’s activity and the asserted “adverse effects” to be addressed by the fee. *Sinclair Paint*, 15 Cal.4<sup>th</sup> at 878. “[R]egardless of the type of fee, it must bear some reasonable

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<sup>1</sup> See *Northwest Energetic Services, LLC v. California Franchise Tax Board*, 159 Cal.App.4<sup>th</sup> 841 (2008); *Bay Area Cellular Telephone Co. v. City of Union City*, 162 Cal.App.4<sup>th</sup> 686 (2008); *Morning Star Co. v. Board of Equalization*, 201 Cal.App.4<sup>th</sup> 737 (2011).

relationship to the benefits and costs associated with the service . . . .” *Bay Area Cellular*, 162 Cal.App.4<sup>th</sup> at 694.

**Fees must be limited to the reasonable cost of the government regulation or the service provided to payers.** *Sinclair Paint* recognizes that “fees charged in connection with regulatory activities” may “not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged.” 15 Cal.4<sup>th</sup> at 876. Following *Sinclair Paint*, the California Supreme Court reiterated that a fee may not “exceed the reasonable cost of providing services necessary to regulate the activity for which the fee is charged.” *California Farm Bureau Federation*, 51 Cal.4<sup>th</sup> at 438.

**Fees must be fairly and reasonably apportioned among payers.** Under *Sinclair Paint*, the fees must be apportioned “so that charges allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on or benefit from the regulatory activity.” *Sinclair Paint*, 15 Cal.4<sup>th</sup> at 878; quoting *San Diego Gas & Elec. Co. v. San Diego Cnty. Air Pollution Control Dist.*, 203 Cal.App.3<sup>d</sup> 1132, 1146 (1988).

Under *Sinclair Paint*, a fee that does not comply with these limitations constitutes an impermissible tax under Proposition 13 unless approved by two-thirds majority of the Legislature. See *Sinclair Paint*, 15 Cal.4<sup>th</sup> at 875-876, 881.

**II. THE LIMITATIONS IDENTIFIED IN *SINCLAIR PAINT* SHOULD APPLY WHERE, AS HERE, THE STATE ASSERTS THAT IT IS IMPOSING A FEE UNDER ITS POLICE POWER.**

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The auction and sale of allowances by ARB has generated more than \$1.5 billion in revenue to date, and the trial court noted that the “auction provisions of AB 32 will result in a cumulative net increase in state revenues” of “as much as \$12 to \$70 billion.” JA 1578. That is much more than a mere “incidental production of revenue,” as ARB erroneously suggests. *See* Respondents’ Brief of ARB, p. 52.

Indeed, the limitations identified in *Sinclair Paint* should apply whenever the State uses its police power to generate revenue. In identifying the limitations dictated by Proposition 13, the California Supreme Court in *Sinclair Paint* assumed that the State was asserting its police power authority in imposing fees. The issue addressed by the California Supreme Court was what limitations are required by Proposition 13, even assuming that the State is exercising its police power to generate revenue. The State’s assertion that it is imposing a fee under its police power is the starting point, not the end point, of the proper analysis under *Sinclair*. The California Supreme Court in *Sinclair Paint* has “set out guidelines for determining whether a denominated fee is, in fact a bona fide

regulatory fee and not a disguised tax.” *Tomra Pacific, Inc. v. Chiang*, 199 Cal.App.4<sup>th</sup> 463, 487 (2011).

The *Sinclair Paint* limitations should apply to both traditional fees and novel programs, like ARB’s auction and sale of allowances. A program’s “novelty” or its choice of “new remedies” does not alter or obviate the *Sinclair Paint* analysis – if anything, it underscores the importance of applying the limitations identified in *Sinclair Paint*. See Brief of Interveners and Respondents Environmental Defense Fund, et al., p. 48.

Here, ARB does not dispute that it is asserting its police power to justify the auction and sale of allowances. See Respondents’ Brief of ARB, p. 47. Thus, *Sinclair Paint* should apply. See JA 60 (recognition by Legislative Analyst that “Sinclair nexus test” applies, based on opinion from Legislative Counsel).

### **III. AS APPELLANTS HAVE SHOWN, THE AUCTION AND SALE OF ALLOWANCES VIOLATE THE *SINCLAIR PAINT* LIMITATIONS.**

As discussed in appellants’ briefs, the auction and sale of allowances by ARB clearly violate the *Sinclair Paint* limitations. Indeed, the trial court noted that it “would agree if *Sinclair Paint* is the test the state loses.” RT 25.

Because the auction of allowances fail to meet the *Sinclair Paint* limitations, it is a “disguised tax” (*Tomra Pacific*, 199 Cal.App.4<sup>th</sup> at 487)—“[a]n excessive fee that is used to generate general revenue becomes a tax.”<sup>2</sup> *Morning Star*, 201 Cal.App.4<sup>th</sup> at 751. Indeed, recent action by the Legislature confirms that the auction is being used to generate general revenue.

In their Appellants’ Opening Brief, appellants California Chamber of Commerce, et al., describe the various programs that the Legislature has recently chosen to fund with revenue from the auction and sale of allowances for greenhouse gas emissions. *See* California Chamber of Commerce Appellants’ Opening Brief, pp. 41-42. The Legislature has appropriated proceeds from the sale of greenhouse gas allowances for a grab-bag of programs, including:

- High-speed bullet train project
- Transit and intercity rail
- Active transportation projects (bicycle and walking paths)
- Affordable housing
- Weatherization projects
- Agricultural energy efficiency

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<sup>2</sup> As noted by appellant California Chamber of Commerce in its reply brief, ARB does not and cannot assert that the auction and sale provisions impose “penalties.” *See* California Chamber of Commerce Appellants’ Reply Brief, pp. 47-50.

- Energy conservation for public buildings
  - Wetland and watershed restoration
  - Fire risk reduction and forest health
- 
- Urban forestry
  - Solid waste diversion
  - Stop-light synchronization projects
  - Support of the Department of Fish and Wildlife

*Id.*; citing Stats. 2014, ch. 25 [SB 852]; Stats. 2014, ch. 36 [SB 862].

This recent action by the Legislature is noteworthy in at least two respects. First, it confirms that ARB's auction and sale is for the purpose of generating revenue, unrelated to regulation of greenhouse gas emissions. Each of the items to be funded from the auction and sale of allowances is the sort of government program that normally would be funded from the state's General Fund—that is, from tax revenues. In many cases, these programs already were funded through General Fund tax revenue, but funding for these programs was diverted so cap-and-trade revenue could cover these costs. For example, in Fiscal Year 2012-13, the state shifted \$500 million from cap-and-trade revenue to fund existing programs, previously financed from the General Fund. *See* 2012 Stats. Ch. 21, sec. 15.11(a); JA 60-61 (Legislative Analyst report explaining shift of auction revenue).

Second, the recent action by the Legislature confirms that there is no reasonable nexus between the fee-payers and the programs to be funded by the revenue from the auction and sale of allowances. The fee-payers (the purchasers of allowances for greenhouse gas emissions) are by definition, emitters of greenhouse gases. But their emissions do not have a reasonable “causal connection or nexus” to the programs that the Legislature has chosen to fund. A factory that emits greenhouse gases does not generate a need for affordable housing or high-speed bullet trains,<sup>3</sup> The proceeds from the auction and sale of greenhouse gas allowances is not being used to regulate the emissions of the purchasers of those allowances and is, therefore, a tax. At best, the funds are being used for projects that have only the slimmest connection to environmental affairs generally. “The charge is therefore a tax. At its most basic level, [it] is not a regulatory fee because it is not regulatory.” *Morning Star*, 201 Cal.App 4<sup>th</sup> at 755.

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<sup>3</sup> Indeed, construction and operation of the bullet train system will result in a net increase in greenhouse gas emissions in its first 30 years. See California Chamber of Commerce Appellants’ Opening Brief, p. 42, n. 23.



**CONCLUSION**

For the reasons stated above, amicus curiae CalTax respectfully submits that the judgment should be reversed.

Dated: May 15, 2015.

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**  
**(California Rules of Court 8.204(c))**

The text of this brief consists of 2,164 words, not including tables of contents and authorities, application and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: May 15, 2011.

By Kevin M. Fong  
Kevin M. Fong

Attorneys for Amicus Curiae  
California Taxpayers Association

PROOF OF SERVICE BY MAIL

I, Mary C. Green, the undersigned, hereby declare as follows:

1. I am over the age of 18 years and am not a party to the within cause. I am employed by Pillsbury Winthrop Shaw Pittman LLP in the City of Sacramento, California.
2. My business address is 2600 Capitol Avenue, Suite 300, Sacramento, CA 95816-5930.
3. I am familiar with Pillsbury Winthrop Shaw Pittman LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service; in the ordinary course of business, correspondence placed in interoffice mail is deposited with the United States Postal Service with first class postage thereon fully prepaid on the same day it is placed for collection and mailing.
4. On May 15, 2015, at 2600 Capitol Avenue, Suite 300, Sacramento, CA 95816-5930, I served true copies of the attached document titled exactly APPLICATION FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF and BRIEF OF AMICUS CURIAE CALIFORNIA TAXPAYERS' ASSOCIATION IN SUPPORT OF APPELLANTS by placing them in addressed, sealed envelopes clearly labeled to identify the persons being served at the addresses shown below and placed in interoffice mail for collection and deposit in the United States Postal Service on that date following ordinary business practices:

**[See Attached Service List]**

I declare under penalty of perjury that the foregoing is true and correct. Executed this 15th day of May, 2015, at Sacramento, California.

---

Mary C. Green

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<p>California Supreme Court  Clerk of the Court  350 McAllister Street  San Francisco, CA 94102</p> <p><i>Via E-Submission</i></p>	<p>Sacramento County Superior Court  Hon. Timothy M. Frawley  720 Ninth Street  Sacramento, CA 95814</p>