No. S123481

IN THE
Supreme Court of the State of California

THE MORNING STAR COMPANY,

Plaintiff/Petitioner,

v.

STATE BOARD OF EQUALIZATION and

DEPARTMENT OF TOXIC SUBSTANCE CONTROL,

Defendants/Respondents.

After Decision by the Court of Appeal Third Appellate District No. C033758
Sacramento County Superior Court No. 98AS03539
The Honorable John R. Lewis, Judge

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I. THE DTSC'S DETERMINATIONS WERE "REGULATIONS" SUBJECT TO THE APA.

Abandoning the Court of Appeal's rationale and their arguments below, respondents rely exclusively on an *exception* to the APA's requirements for a "regulation that embodies the only legally tenable interpretation of a provision of law." GOV'T CODE § 11340.9(f); Answer Brief 8-9.

But the claim that § 25205.6 bears only *one* possible interpretation requiring the imposition of the fee on *all* corporations with 50+ employees contradicts the language of the statute, administrative interpretations of similar statutes, and all semblance of logic. At a minimum, § 25205.6 is amply susceptible of narrower interpretations and DTSC's current interpretation is based on factual and policy assumptions that have not been vetted through APA procedures and hence deserve no deference. Indeed, were the parties' roles reversed and *DTSC* claiming administrative

discretion to interpret the statute, the contention that it lacked such discretion would be largely frivolous.

As noted in petitioner's opening brief ("Brief"), at 19-23, every basic principle of statutory construction demonstrates that DTSC was directed to *select* responsible businesses from among the panoply of SIC codes, not merely copy the codes wholesale. The statutory limitations on the fee to businesses that "use" materials posing a "significant" threat based on quantity, concentration, or characteristics provide ample discretion in distinguishing among business types. Any other interpretation would render large swaths of the statute meaningless. *Grogan-Beall* v. *Ferdinand Roten Galleries, Inc.* (1982) 133 Cal. App.3d 969, 979, 184 Cal. Rptr. 411 (interpretations creating surplusage are to be avoided).[1]

Respondents' single ambiguous definition of the word "use," Answer 19, hardly precludes a narrower definition of the word such as adopted by the U.S. Supreme Court. Brief 17. Furthermore, even the broad definition does not foreclose administrative interpretation. Respondent's expansive view of "use" and "related" to mean that *any* human activity is ultimately "part of the hazardous waste stream" is surely not the only conceivable interpretation, renders meaningless any distinction between hazardous and other kinds of materials, and makes limiting the fee to corporations alone all the more irrational.

The claim, at 18, that the plain language of § 25205.6 excludes an interpretation distinguishing among businesses based on the *amount* of

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[1] Contrary to respondents' suggestions, at 18, 14, petitioner has not "conceded" that the Legislature intended to impose the fee on *all* corporations or that petitioner uses hazardous materials as properly defined. [CT 1228-29 & n. 4]

hazardous materials used disingenuously begs the question. As petitioner has explained, the *very categorization* of a material as hazardous or not turns on both its quantity and its physical characteristics. A material that, if present in large and unencapsulated quantities would be a hazardous material is *not a hazardous material at all* when present in minimal quantities in a form posing little risk of exposure.

While the question for the Court at this point is merely whether different interpretations are *possible*, and hence APA procedures are required, petitioner's alternative interpretation is in fact more consistent with the statute and is the only interpretation here that makes sense of and gives meaning to *all* the language of § 25205.6.

The remaining thrust of respondents' argument is that the definition of hazardous materials is so broad that it necessarily includes even ordinary items used by all businesses. But respondents ignore the numerous limitations on the definition in § 25501(o) and the other definitions incorporated therein, and have failed to exercise the sound administrative judgment that such limitations require.

As for the incorporated definitions of hazardous materials, substances, and wastes cited by respondents, they generally hurt rather than help respondents' defense. "Hazardous materials" in § 25501(o), cover:

> any material that, because of its quantity, concentration, or physical or chemical characteristics, poses a significant present or potential hazard to human health and safety or to the environment if released into the workplace or the environment. "Hazardous materials" include, but are not limited to, hazardous substances, hazardous waste, and any material which a handler or the administering agency has a reasonable basis for believing that it would be injurious to the health and safety of persons or harmful to the environment if released into the workplace or the environment.

Several other provisions are cross-referenced in the related definitions of "hazardous substance" and "hazardous waste." §§ 25501(p) & (q). Those provisions are of little assistance to respondents.

For example, state law involving workplace safety communications and Material Safety Data Sheets (MSDSs), applicable to hazardous substances present in the workplace, provides that substances that might be considered hazardous under certain circumstances will not even be considered or listed "as *present* occupationally" if the particular "form" of such substance "is not potentially hazardous to human health." LABOR CODE § 6382(a).[2] Furthermore, a "substance, mixture, or product shall not be considered *hazardous*" if an otherwise hazardous incorporated substance "is *in a physical state, volume, or concentration* for which there is no valid and substantial evidence" of a health risk. *Id*. (emphasis added). Those limitations are entirely in line with petitioner's position that whether a substance is hazardous and whether it is being used both require more than *de minimis* amounts or dangers, based on § 25501(o)'s requirement that the actual or potential hazard be *significant*, not merely conceivable.

Such ample room for interpretation is reflected in the MSDS regulations listing "hazardous substances" and containing various limitations on when particular substances will be considered hazardous. 8 CAL. CODE REGS. § 339. In addition to substance-specific exemptions for non-hazardous quantities, concentrations, or forms, the regulations also contain a general exemption for "extruded, molded or coated products containing listed hazardous substances in bound form except when these

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[2] The MSDS statute also defines hazardous substances to be "present" in a mixture or "product" *only* if they exceed certain adjustable threshold levels. LABOR CODE § 6383(a).

substances can be released in the workplace under normal conditions of work or in reasonably foreseeable emergencies resulting from workplace operations." *Id*. & fn. a1.

Respondents' examples simply ignore those limitations, leaving the false impression that ordinary products are unavoidably defined as hazardous. For example, while respondents list "ammonia" as a supposedly common hazard, Answer 13, they ignore the fact that typical cleaning solutions instead contain "ammonium hydroxide" (ammonia and water), which is listed as a separate "substance" and deemed hazardous only in solutions of 4% or more. 8 Cal. Code Regs. § 339 & fn. 29. Most ordinary cleaners contain only 1%-3% solutions of ammonium hydroxide. http://www.madsci.org/posts/archives/may98/892498078.Ch.r.html. Respondents similarly list gasoline as an example, but neglect to inform this Court of gasoline's exemption from the regulatory definition "when used as a fuel." 8 Cal. Code Regs. § 339 & fn. 16.[3]

Federal law and regulations regarding MSDSs likewise illustrate the considerable room for judgment, and the need for regulations, inherent in deciding whether hazardous substances are used in the workplace. Pet. Br. 17. OSHA regulations provide an exemption for consumer products under

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[3] Other substances generally listed as "hazardous," but unquestionably subject to the exercise of judgment as to whether the form and magnitude of their presence are hazardous include: Aluminum metal (ubiquitous yet typically not requiring an MSDS); ethyl alcohol (exempt below certain concentrations and when part of an alcoholic beverage); silica (found in glass and dirt but exempt in various contexts); and testosterone (again ubiquitous and often used to excess by various employees). 8 CAL. CODE REGS. § 339 & fns. 13, 25, 35. Respondents' unqualified reference, at 13, to "fluoride" as a hazardous material illustrates the absurdity of eschewing the exercise of judgment and would render virtually *all* drinking water (having natural and sometimes added fluoride) a hazardous material.

normal use and for manufactured products that release no more than *de minimis* amounts of a hazardous chemical. 52 Fed. Reg. 31852, 31862 (Aug. 24, 1987); 29 CFR § 1910.1200(b)(6)(v) & (c). Contrary to respondents' suggestion, at 15, such exemptions do not "highlight" the definitional breadth of hazardous materials, but rather "limit the term's application," and are *incorporated* by reference into § 25205.6, as respondents themselves argue. Those limitations consistently reflect § 25501(o)'s focus on the *significance* of any threat based on the quantity and characteristics of a material in a particular context, not in the abstract. Such limits in the incorporated definitions establish that DTSC's expansive interpretation is hardly the *only* legally tenable interpretation of the law.

As for the various other definitions of hazardous substances, respondents simply ignore the context-sensitive nature of those definitions thus drawing the faulty and unrequired conclusion that a substance hazardous in one situation is hazardous in all situations. For example, 49 CFR §§ 171.8 and 172.101 indeed list aerosols, batteries, and fire extinguishers but only deem them hazardous "when transported in commerce." That contextual and industry-driven assessment of hazardous materials does not support or require the conclusion that such items are likewise hazardous when simply present in offices in small quantities rather than when transported in bulk.

Respondents' references, at 14, to household appliances, lead batteries, small batteries, latex paint, household waste, and fluorescent bulbs likewise all ignore the particular contexts and circumstances in which such items are deemed hazardous. *See* §§ 25211, 25212 (materials hazardous when removed from appliances after disposal, not while in ordinary use); § 25215 (lead acid batteries in vehicles hazardous at time of disposal only); § 25216 (small household batteries – deals with businesses

that process such batteries in quantity); § 25217 (applies to disposal of *liquid* latex paint, not paint on walls); § 25218 (household hazardous waste only in certain circumstances and quantities); § 25218.5 (fluorescent bulbs only if above certain size). While particular circumstances can render such items hazardous – particularly when they are aggregated for disposal – the circumstances of typical business use involve much smaller quantities, concentrations, and encapsulated forms of such materials, rendering them non-hazardous. To argue, as respondents do, that the hazard must be viewed in terms of state-wide aggregation of such items would render the statutory criterion of quantity and concentration meaningless and would likewise eliminate any point in focusing on various types of businesses. At a minimum, such an "aggregation" principle for identifying a "hazard" is a policy choice not *required* by the statute and hence subject to APA procedures.

The claim, at 16, that § 25205.6's reference to the "potential" for harm if "released" even from materials having no harm as they are actually present in the workplace does nothing to distinguish the OSHA regulations or other definitions turning on the quantity and character of various products given that those definitions likewise incorporate a standard of "potential" harm yet still exempt *de minimis* amounts of materials. 29 CFR § 1910.1200(c) ("health hazard" includes chemical from which health effects "may" occur).[4] Likewise while respondents concede that toner

[4] Respondents, at 11, inadvertently identify yet another limitation on the applicability of § 25205.6 by noting that the definition of "release" covers spilling, leaching, disposing, etc. "*unless permitted* or authorized by a regulatory agency." § 25501(s) (emphasis added). Of course, for the minimal quantities of consumer and office products at issue in this case, ordinary disposal *is* permitted, and would not constitute a "release."

cartridges, computers, and light bulbs do not pose a significant present hazard in the workplace, the factual assertion that the minor quantities of materials contained therein would pose a "significant" potential hazard if released is simply a conclusion without evidence or analysis. Having made no effort to define what degree of risk is significant or insignificant, the bare assertion is meaningless and cannot substitute for the requirements of rulemaking.

Respondents illogically claim that the evolution of § 25205.6's reference from two-digit SIC codes to just the SIC codes in general rebuts the notion that they were to be used to distinguish among corporations. Answer at 20-21. If anything, that evolution does precisely the opposite. If the two-digit codes were indeed inadequate to fairly distinguish among businesses, then it makes perfect sense to remove the reference to the two-digit codes and leave it to the DTSC as to when and whether to use the four-digit codes to distinguish among businesses.[5] That the Legislature gave DTSC something to do with the SIC codes at all remains the best possible indicator that it intended the exercise of some discretion.[6]

Finally, the claim, at 25, that exempting corporations that do not use materials posing a "significant" hazard would undermine the law by

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[5] Mandating that DTSC use four-digit codes all the time would have made no sense because in some areas like heavy manufacturing including a two-digit code would be more efficient. As the statute now stands, DTSC has the discretion to use two- or four-digit codes as appropriate.

[6] The suggestions, at 16-17, 22, that the Legislature was told by a Commission report and a staff report that all businesses use hazardous materials does not show that the Legislature *endorsed* such views. If it had, it would have simplified the statute to apply it directly to all businesses. But by using and keeping the language creating discretion over business type, materials, and use, the Legislature seems to have rejected such views.

reducing revenues simply begs the question of the law's purpose. As the legislative history amply demonstrates, the purpose of the law was not revenue raising for its own sake, but rather the shifting of costs to those *responsible* for the wastes but who had not previously paid for remedial efforts. Brief 22, 33-34. Indeed, respondents concede as much, and contradict the very premise of their argument, by claiming that the Legislature used "corporate status and employee numbers as a proxy for size and consumption of hazardous materials." Answer 22. While such criteria are irrational *means* of targeting consumption of hazardous materials, the target itself belies the notion that the purpose was merely to raise funds regardless of responsibility.

Ultimately, the very definitions and regulations that respondents cite as incorporated into § 25205.6 demonstrate that determining the presence or "use" of "hazardous materials" is a highly contextual exercise of judgment, not a mindless and pre-ordained conclusion as respondents suggest. And such judgment must be exercised according to APA procedures.

II. THE HAZARDOUS-MATERIALS FEE IS A REGULATORY FEE, NOT A TAX.

Despite respondents' disingenuous protestations to the contrary, Answer 34, both the Court of Appeal and respondents rely on their characterization of the hazardous-materials fee as a tax to essentially eliminate any constitutional scrutiny under either equal protection or due process. The Court of Appeal expressly applied a "deferential standard of review used to assess the constitutionality of a tax." Opinion at 25. And respondents likewise rely on numerous cases for the proposition that tax classifications receive little or no constitutional scrutiny. Answer 36-37. Respondents make virtually no attempt to justify the classifications drawn

under a standard of review applicable to regulatory fees and other exercises of the police power. The distinction between taxes and fees thus remains relevant to the outcome of this case.

Under the straightforward criteria of *Sinclair Paint Co.* v. *State Bd. Equalization* (1997) 15 Cal.4th 866, 64 Cal. Rptr.2d 447, the hazardous-materials fee is a regulatory fee designed to support various remedial programs all related to hazardous materials. Such "mitigating effects" measures constitute "regulatory activities" under the first element of the *Sinclair* test. 15 Cal.4th at 875, 64 Cal. Rptr.2d 447. Respondents do not dispute that the fee does not exceed the reasonable cost of such activities, satisfying the second *Sinclair* element. And they do not dispute that the fees are not used for "unrelated" revenue purposes, satisfying the final *Sinclair* element.

Respondents' primary argument for why the hazardous-materials fee is a "tax" is the flawed assertion that its only function is revenue generation and that it is not regulatory because it has no relationship to the conduct of the businesses paying the fee or the burdens they impose. Of course respondents repeatedly contradict their own claim by arguing that the classifications in the fee serve "as a proxy for business size and consumption of hazardous materials," Answer 1, 22, and thus at least *attempts* – albeit with unconstitutional imprecision and irrationality – to relate the fee to the hazardous-materials burdens imposed by the businesses. It was intended to spread the costs of a specific set of remedial measures to those deemed *responsible* for the problem.[7]

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[7] Respondents' claim, at 26 n.11, that petitioner did not exhaust its administrative remedies is quite disingenuous given that DTSC did not follow APA procedures. Respondent challenged the imposition of the fee

Respondents also argue that the hazardous-materials fee is not regulatory because its primary purpose is to raise money, not change behavior. The exact same argument was rejected in *Sinclair*, which held that funding remedial measures is sufficient for a regulatory classification wholly apart from any deterrent effect. In any event, the fee in this case *does* in fact alter conduct, or at least aims to. As noted previously, the statutory focus on the use of materials posing a "significant" threat provides an incentive to minimize the use of such materials below the significance threshold and thereby avoid the fee by avoiding "hazardous" levels of use. It is only DTSC's refusal to implement the "significance" limits on the definition of hazardous materials that has thwarted such behavior-modifying effects. Further, even if corporations cannot avoid the fee, by increasing the cost of products and services from such corporations, the fee provides consumers an incentive to purchase from companies out of state (or encourages businesses to move themselves), thus shifting any hazardous-materials burden from such business activities away from California. While such effects come at the cost of jobs and economic growth, they certainly constitute behavior modification that reduces California's hazardous-materials burden.

They also claim that a tax imposed for a specific purpose can still be a tax if the basis for apportioning the fee is not based on the payer's nexus to a benefit it gained or a burden it imposed. Answer 26, 27. The notion that the Legislature could avoid classification as a tax by targeting tax

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in the only manner available to it – through the SBE's procedures. Once DTSC issues regulations according to procedure, petitioner will, if still necessary, certainly take advantage of the procedures and requirements for judicial review of such properly issued regulations. But there is certainly no jurisdictional bar to the currently framed challenge to the fee.

revenues to specific purposes is a red herring. Such a fee would fail the first element of the *Sinclair* test in that it would not be a mitigating-effects measure given the complete dissociation between the class taxed and the purposes of the programs funded.[8] But such dissociation is very different from an equal protection challenge based on under-inclusiveness or claiming that an agency implemented the fee in an over-inclusive manner.

Furthermore, as explained in petitioner's opening brief, at 34-35, the *definitional* aspect of *Sinclair* did not include a requirement that a regulatory fee have a nexus with the individual activities of those subject to the fee. That discussion involved the very validity of an exercise of the police power and the availability of a statutory exemption to the fee, not whether such fee was regulatory. *See Sinclair*, 15 Cal.4th at 877-78, 881, 64 Cal. Rptr.2d 447. (definitional issue)

Furthermore, at the statutory level, there is no dispute that such a nexus exists between the payers and the remedial object of the fee: The fee is imposed only corporations that "use" hazardous materials. That the administrative definition of such terms is over-inclusive and hence covers corporations that do not genuinely use hazardous materials cannot change the characterization of the statute. It only calls into significant doubt the validity of DTSC's interpretation and its fidelity to the statutory purpose. Brief 35-36. None of the constitutional flaws implicate a legislative attempt to raise unrelated revenue, which is the hallmark of a tax.

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[8] For example, Proposition 10 imposing new cigarette taxes was properly called a tax because the revenue went to the unrelated purposes of early child development, not merely mitigating the effects of smoking.

Ultimately, respondents' argument concerning a required nexus would force the absurd notion that every invalid regulatory fee is *ipso facto* a valid tax subject to lower constitutional scrutiny. That simply makes no sense, is not the law, and should not be the law. Rather, under a plain application of *Sinclair*, the hazardous-materials fee is a regulatory fee, subject to ordinary challenges to its constitutional validity overall, and not a tax allegedly immune from constitutional scrutiny.

III. THE HAZARDOUS-MATERIALS FEE VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Once § 25205.6 is recognized for what it is – a mitigating effects measure expressly intended to place the cost of cleanup on those who use and generate hazardous materials, *i.e.*, those responsible for the burden – the constitutional deficiencies of the fee become apparent. The fee is wildly under-inclusive in that it excludes non-corporate businesses with 50+ employees and excludes all businesses with fewer than 50 employees regardless of whether they use hazardous materials. And, as incorrectly applied by the DTSC, the fee is vastly overbroad in including corporations such as petitioner solely on the presence of *de minimis* substances in ordinary office products that pose no *significant* danger to health or safety.

Given such gross under- and over-inclusiveness, the imposition of the fee is simply arbitrary and is not based on any "ground of difference having a fair and substantial relation to the object of the legislation." *Brown*, 8 Cal.3d at 861, 106 Cal. Rptr. 288 (citations and quotation marks omitted). The under-inclusiveness, in particular, can only be explained as an improper means of escaping "the political retribution that might be visited upon them if larger numbers were affected.'" *Hayes*, 25 Cal.3d at 787, 160 Cal. Rptr. 102 (citation omitted).

Under ordinary, yet serious and genuine, rational basis scrutiny, respondents' proffered justifications for the classifications are wholly inadequate. The classifications at issue not only lack a "fair and substantial relation to the object of the legislation," *Brown* v. *Merlo* (1973) 8 Cal.3d 855, 861, 106 Cal. Rptr. 388, they are in fact inimical to that object. They impose a mitigation burden on corporations with no material responsibility for hazardous materials as properly construed, and they exempt from that burden companies with vastly greater responsibility for genuinely hazardous materials. While laws need not attack all evils of a genus, Answer 37, when confronted with "evils" of the same *species*, a law must evince "some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager* (1966) 384 U.S. 305, 308-309.

The sheer absurdity of the classifications – particularly the corporate/non-corporate distinction – can be seen by the examples offered in petitioner's opening brief, at 42, which respondents do not even *attempt* to rationalize. There are approximately 16,000 non-corporate businesses with 50+ employees, [CT 160], and including those businesses in the fee would generate an additional $3 million, a 30% increase. Those additional companies represent only an additional 3.3% of all businesses and there is no conceivable administrative convenience in not taxing such similarly situated companies for a 30% increase in fees.[9]

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[9] The suggestion that SBE would have to collect the fee from 95% of all companies to reap an 30% increase in fees is incorrect. Corporate businesses with 50+ employees represent 5% of *all* businesses, but only 60% of businesses of equal or greater size. The increase in fee revenue is thus reasonably consonant with the increase in coverage and poses no undue administrative burden.

Literally thousands of non-corporation businesses employ in excess of fifty persons, are materially indistinguishable from businesses that are covered, but are not required to pay the environmental fee. [CT 244; CT 133-160].

Respondents' reliance on differential tax classifications for individuals, partnerships, and corporations has already been addressed in petitioner's opening brief, at 43-44. Such distinctions turn on aspects of incorporation that are indeed meaningful to revenue generation and property ownership, but have no relevance to classifications based on substantive operations or hazardous-materials use. Respondents' examples, at 39, of distinctions in taxi cab taxation and property transfer rules simply illustrate situations where corporate status has some relation to the purposes of the law, but they are not even remotely analogous to the regulatory fee in this case.

Respondents' renewed assertion, at 38, that the number of employees is a reasonable proxy for a company's size and use of hazardous materials simply makes no sense given DTSC's overly broad definition of hazardous materials. Because DTSC treats sitting at a computer the same as manufacturing PCBs, there is simply no coherent relation between the number of employees and the hazardous-materials burden imposed. A thousand office workers likely would have far less of a connection to hazardous materials than does a single industrial worker directly using such materials in the manufacturing process.[10]

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[10] And the notion that the 50-employee line protects smaller businesses ignores that there is no *administrative* burden in paying the fee – all companies already report their employment figures to the State and pay a variety of fees – only a financial burden. Size and profitability are unrelated, hence the classification does not further any valid purpose.

In the end, even under rational basis scrutiny, the distinctions drawn here are so irrational, so arbitrary, and so inimical to the stated purposes of the law that they cannot survive constitutional scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeal.

Respectfully Submitted,

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I hereby certify that, on this 21st day of July, 2004, I caused a copy of the foregoing Reply Brief for Petitioner to be served by Overnight Federal Express, postage pre-paid, on:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief for Petitioner complies with the 4,200 word type-volume limitation of Appellate Rule 29.1(c)(1) in that it contains 4180 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word XP. Counsel agrees to furnish to the Court an electronic version of the brief upon request.

_____
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