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CALIFORNIA INITIATIVE REVIEW

Proposition 23: Suspension of Global Warming until Unemployment Drops Initiative Statute.

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I. EXECUTIVE SUMMARY

In 2006, Governor Schwarzenegger signed Assembly Bill 32, “The Global Warming Solutions Act of 2006.” Pursuant to AB 32, the California Air Resource Board (CARB) set the goal of reducing California’s greenhouse gas emissions to its 1990-emissions level by 2020. In order to achieve this goal, CARB created the AB 32 Scoping Plan, which laid out a five-year timeline for various emission-reducing regulations and market measures that would all take effect no later than January 1, 2012. CARB expects that implementation of these measures will reduce California’s greenhouse gas emissions significantly over the course of several years and improve the state’s economy as the need for clean technology sparks innovation in the marketplace.

Due to California’s current diminished economic state, Proposition 23 seeks to suspend AB 32 until California’s unemployment rate drops to 5.5% for four consecutive quarters. Currently, the state has a 12% unemployment rate that is not showing any major signs of improvement, and there is significant debate over whether suspending AB 32 will actually benefit the state’s economy. It will likely be several years before California’s unemployment rate drops to 5.5%; accordingly, it is unclear if the AB 32 Scoping Plan would ever be reinstated. Opponents of Proposition 23 believe that the temporary suspension contemplated by Proposition 23 will translate into a permanent one, and they worry that suspending AB 32 will cause California to lose its leading foothold in the struggle against global warming.

Should Proposition 23 pass, all AB 32 regulations already in effect would be halted, and all future actions of CARB that would otherwise occur under the authority of AB 32 would be suspended. Proponents argue that suspending AB 32 will allow California businesses to avoid increased costs that the new emissions regulations would demand, thus maintaining their operation costs, spending at the current status quo, and ultimately keeping jobs safe. Opponents argue that suspending AB 32 will result in depletion to jobs in California’s growing clean technology market because foreign and domestic businesses will no longer want to invest in clean technology innovations that California is currently developing. The coalitions behind and against Proposition 23 are attached as Appendix A and B, respectively.¹

II. BACKGROUND: INCREASE IN GLOBAL WARMING SPARKS LEGISLATIVE ACTION IN CALIFORNIA

a. The effect of global warming, including drastic climate change due to excess greenhouse gasses, is a growing problem worldwide.

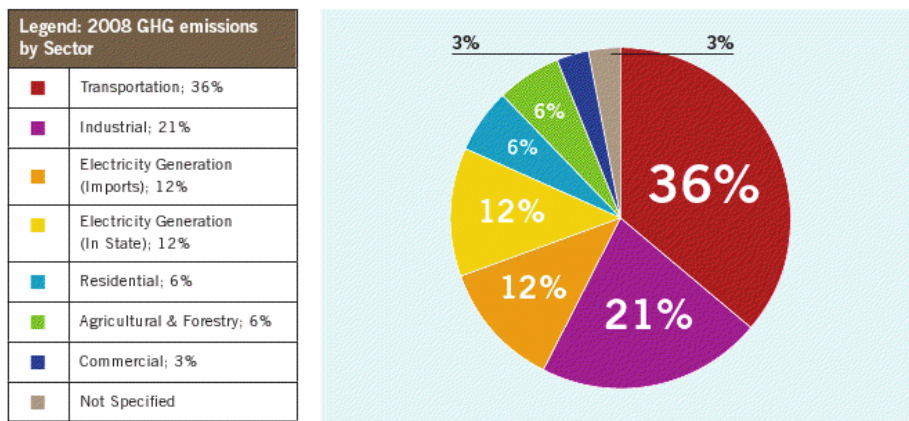
“Global warming” refers to the average increase in the temperature of the Earth’s surface. Most of the temperature increase is caused by “greenhouse gas emissions,” such as carbon dioxide, that absorb and emit radiation within the thermal infrared range.² Greenhouse gases (GHGs) are necessary to keep the Earth warm enough to sustain life, but an excess of the gases will cause a

¹ See Appendix A and B, attached.

² Global Greenhouse Warming.com, Definition for Global Warming, *available at* <http://www.global-greenhouse-warming.com/definition-for-global-warming.html>.

drastic change in the Earth’s climate that may potentially be fatal to many of Earth’s life forms.³ This is known as the “greenhouse effect.”

Certain everyday activities, such as the burning of fossil fuels to run cars, factories and power plants, have been causing steady increases in the amount of greenhouse gases in Earth’s atmosphere.⁴ The state of California in particular is a significant emitter of greenhouse gases; following Texas, California is the second largest emitter of greenhouse gases in the country.⁵ Of the major sectors in the State, the transportation sector is the biggest producer of greenhouse gases, followed by the electric power sector.⁶ The figure below indicates California’s greenhouse gas emissions by sector between 2000 and 2008.⁷



b. California seeks to address the problem of global warming with Assembly Bill 32, the Global Warming Solutions Act of 2006.

In September 2006, California passed Assembly Bill 32, the Global Warming Solutions Act of 2006.⁸ Pursuant to the Act, California set a goal of reducing greenhouse gas emissions to 427 million metric tons of carbon dioxide by 2020.⁹ This amounts to a 25 percent reduction in carbon emissions and mirrors the emissions levels in California during the year 1990.¹⁰

³ Environmental Defense Fund, *The Basics of Global Warming*, available at <http://www.edf.org/page.cfm?tagID=35215&source=ggadgw35215&gclid=CKLAzfCuiKQCFQgEbAodMFcRHg>.

⁴ *Id.*

⁵ World Resources Institute, *Climate Analysis Indicators Tool*, available at <http://cait.wri.org/>.

⁶ California Air Resources Board, *California Greenhouse Gas Inventory for 2000-2008 – by Category as Defined in Scoping Plan (May 12, 2010)*, available at http://www.arb.ca.gov/cc/inventory/date/labelsghg_inventory_scopingplan_00-08_2010-05-12.pdf.

⁷ *Id.*

⁸ 2006 Cal. Stat. ch. 488; Cal. Health & Safety Code § 38500 et. seq.

⁹ California Air Resources Board, *Assembly Bill 32: Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>. <http://www.arb.ca.gov/cc/ab32/ab32.htm> [hereinafter Assembly Bill 32].

¹⁰ Press Release, Office of the Governor, *Governor Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions (Sept. 27, 2006)* (on file with author).

In large part, the motivation behind AB 32 was the greater issue of worldwide global warming and California’s desire to continue its tradition of environmental leadership.¹¹ The California Legislature found and declared that global warming will have detrimental effects on some of California’s largest industries, including agriculture, wine, and recreational and commercial fishing.¹² Describing California as a “national and international leader on energy conservation and environmental stewardship efforts,” the Legislature declared that efforts to reduce greenhouse gases through AB 32 would have “far-reaching effects by encouraging other states, the federal government, and other countries to act.”¹³ As a result, AB 32 required CARB to “achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions,” as specified in the bill.¹⁴

c. CARB is making steady progress in implementing AB 32 and is on track to meet its final deadline of January 1, 2012.

AB 32 “[e]stablishes the first-in-the-world comprehensive program of regulatory and market mechanisms to achieve real, quantifiable, cost-effective reductions of greenhouse gases.”¹⁵ The bill charges CARB with the responsibility for monitoring and reducing GHG emissions. In order to achieve its 2020 target, CARB is following a strict timeline and expects all regulations to take effect by January 1, 2012. The table below depicts this timeline.¹⁶

AB 32 Implementation Timeline	
September 27, 2006	AB 32 signed by Governor
January 25, 2009	ARB creates Environmental Justice and Economic and Technology Advancement Advisory Committees
June 21, 2007	ARB adopts first list of early action measures
October 25, 2007	ARB adopts augmented list of early action measures
December 6, 2007	ARB adopts Mandatory Reporting regulations for greenhouse gases and sets Target for 2020 greenhouse gas emissions
December 2007	ARB adopts first discrete early action measure
December 12, 2008	ARB approves AB 32 Climate Change Scoping Plan
April 23, 2009	ARB adopts Low Carbon Fuel Standard
May 22, 2009	ARB and Cal/EPA create the Economic and Allocation-Advisory to advise on Cap-and-Trade Program
June 25, 2009	ARB adopts last discrete early action measure
2009-2010	ARB and other agencies develop and adopt greenhouse gas rules and

¹¹ Cal. Health & Safety Code § 38501(c).

¹² Cal. Health & Safety Code § 38501(b).

¹³ Cal. Health & Safety Code § 38501(c)-(d).

¹⁴ Cal. Health & Safety Code § 38560.

¹⁵ California Air Resources Board, *Facts about Assembly Bill 32 Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/factsheets/ab32factsheet.pdf> (last visited Oct. 6, 2010).

¹⁶ *Id.*

	programs
January 1, 2010	Early action measures take effect
November 2010	ARB public hearing on Cap-and-Trade regulation
January 1, 2012	All greenhouse gas rules take effect

i. The Nine Discrete Early Action Measures

The “AB 32 Scoping Plan” released in December 2008 outlines how CARB intends to achieve the 2020 greenhouse gas target. The Scoping Plan proposes to implement both regulatory and market-based discrete measures to reduce emissions. The proposed regulatory measures demand specific actions by businesses and individuals, and the market-based measures provide “greater flexibility in how to achieve GHG emission reductions.”¹⁷ As of January 1, 2010, CARB has enforced nine of these discrete early action measures to reduce carbon emissions.¹⁸

1) Low Carbon Fuel Standard

The Low Carbon Fuel Standard (LCFS) is the world’s first global warming standard for transportation fuels. This early action is intended to reduce the state’s reliance on fossil fuels and help the state reach its AB 32 emissions target.¹⁹ Specifically, the LCFS Executive Order, issued in 2007, establishes both a LCFS for transportation fuels sold in California and an initial LCFS goal of reducing greenhouse gas intensity of passenger vehicle transportation fuels by ten percent by 2020.²⁰

2) Landfill Methane Capture

CARB is collaborating with California Integrated Waste Management Board to develop a control measure that provides enhanced control of methane emissions from municipal solid waste landfills. The control measure works to reduce methane emissions by requiring gas collection and control systems on landfills where these systems are not currently required. Other ways to increase energy recovery from landfill methane gas will also be explored through this program.²¹

3) HFC Emission Reduction Measures for Mobile Air Conditioning

¹⁷ Legislative Analyst’s Office, *Proposition 23: Suspends Air Pollution Control Laws Requiring Major Polluters to Report and Reduce Greenhouse Gas Emissions That Cause Global Warming Until Unemployment Drops Below Specified Level for Full Years. Initiative Statute, 3* (July 15, 2010). [hereinafter LAO Report].

¹⁸ Air Resources Board, *Assembly Bill 32: Global Warming Solutions Act*, available at <http://www.arb.ca.gov/cc/ab32/ab32.htm>, *supra* note 7.

¹⁹ Office of the Governor, *The Role of a Low Carbon Fuel Standard in Reducing Greenhouse Gas Emissions and Protecting our Economy*, available at <http://gov.ca.gov/fact-sheet/5155>.

²⁰ California Air Resources Board, *Low Carbon Fuel Standard Program Background*, available at <http://www.arb.ca.gov/fuels/lcfs/lcfs-background.htm>.

²¹ California Air Resources Board, *Landfill Methane Control Capture*, available at www.arb.ca.gov/cc/landfills/landfills.htm.

Hydrofluorocarbons (HFCs) are a class of replacements for chlorofluorocarbons (CFCs), some of which are known to have high global warming potential (GWP).²² GWP gases' impact on the climate is "hundreds or thousands of times greater" than that of carbon dioxide.²³ A predominant refrigerant currently in use in California is HFC-134a, an HFC that is a powerful greenhouse gas and therefore has a high GWP. It has been projected that global emissions of HFC-134a will continue to rise as the global vehicle population grows and mobile air conditioning (MAC) systems grow in number. In response, this measure proposes to reduce HFC emissions associated with MAC systems by:

- Creating a regulation to control emission from smaller containers of automotive refrigerant
- Creating a requirement for low GWP refrigerant in new MAC systems
- Creating a requirement to add an air conditioning leak tightness test
- Enforcing existing federal requirements to recover refrigerant from MAC at end of life
- Creating a measure to reduce GHG emissions from refrigerated shipping containers

The last three proposals of the measure are currently on hold, and it is unclear if and when those proposals will go forward.²⁴

4) Semiconductor Reduction

The purpose of this early action is to reduce fluorinated gas emissions from the semiconductor industry.²⁵ The regulation applies to any owner or operator of a semiconductor or related devices that use fluorinated gases or heat transfer fluids.²⁶

5) SF₆ Reductions from Non-Electric and Non-Semiconductor Applications

Sulfur hexafluoride (SF₆) is GHG with a GWP of 23,900 – the highest GWP identified by the Intergovernmental Panel on Climate Change. In addition to actions taken to reduce SF₆ from non-electric and non-semiconductor applications, CARB developed measures to reduce SF₆ emissions in magnesium die-casting, fume vent hood testing, tracer gas use, and other "niche uses." This regulation was approved in February 2009 and became effective on January 1, 2010, with restrictions on use and sale becoming effective on January 1, 2011.²⁷

²² Environmental Protection Agency, Ozone Layer Protection Glossary, *available at* <http://www.epa.gov/ozone/defns.html#gwp>.

²³ Elkind, Daniel Farber, et al., California at the Crossroads: Proposition 23, AB 32, and Climate Change, 7 (U.C. Berkeley School of Law's Center for Law, Energy & the Environment, Sept. 2010).

²⁴ California Air Resources Board, HFC Emission Reduction Measures for Mobile Air Conditioning, *available at* <http://www.arb.ca.gov/cc/hfc-mac/hfc-mac.htm>.

²⁵ 17 Cal. Code of Reg. § 95320.

²⁶ 17 Cal. Code of Reg. § 95321.

²⁷ California Air Resources Board, SF₆ Reductions from Non-Electric and Non-semiconductor Applications, *available at* <http://www.arb.ca.gov/cc/sf6nonelec/sf6nonelec.htm>.

6) High GWP consumer products

This measure seeks to reduce compounds with high GWP used in consumer products. CARB identifies this measure as a long-term effort and “only a small part of a much larger program, ARB’s Consumer Products Program.”²⁸ The goal of this measure is to reduce the impact of compounds with high GWPs when alternatives are available. Some products with high GWP GHG’s include pressurized containers that utilize nitrous oxide, such as aerosol cheese and dessert toppings.²⁹

7) Heavy-Duty (Tractor-Trailer) Greenhouse Gas Regulation

This measure, adopted in December 2008, works to reduce GHGs by improving the fuel efficiency of heavy-duty tractors that pull 53-foot or longer box-type trailers. This is done by improving tractor and trailer aerodynamics and using low rolling resistance tires. With this regulation alone, the ARB expects GHG emissions to be reduced by approximately one million metric tons of carbon dioxide-equivalents by 2020.³⁰

8) Tire Inflation Regulation

The Tire Pressure Regulation was approved on August 30, 2010 and became effective on September 1, 2010. This measure ensures that tires in older vehicles be checked and inflated at regular service intervals.³¹

9) Shore Power for Ocean-going Vessels

The purpose of this action is to reduce emissions from diesel auxiliary engines on container ships, passenger ships, and refrigerated-cargo ships while berthing at a California port.³² Fleet operators berthing their vessels at these ports may either turn off auxiliary engines for most of the stay at the

²⁸ The Consumer Products Regulatory Program is an “overall effort to reduce the amount of volatile organic compounds (VOCs), toxic air contaminants (TACs), and greenhouse gases that are emitted from the use of chemically formulated product used by household and instructional consumers, including, but not limited to, detergents; cleaning compounds; polishes; floor finishes; cosmetics; personal care products; home, lawn, and garden products; disinfectants; sanitizers; aerosol paints; and automotive specialty products; but does not include other paint products, furniture coatings, or architectural coatings. See California Air Resources Board, Background on Consumer Products, *available at* <http://www.arb.ca.gov/consprod/background.htm>.

²⁹ California Air Resources Board, High GWP Consumer Products, *available at* <http://www.arb.ca.gov/consprod/regact/ghgcp/ghgcp.htm>.

³⁰ California Air Resources Board, Heavy-Duty (Tractor-trailer) Greenhouse Gas Regulation, *available at* <http://www.arb.ca.gov/cc/hdghg/hdghg.htm>.

³¹ California Green Solutions, AB 32’s 44 Early Action Programs by ARB, *available at* <http://www.californiagreensolutions.com/cgi-bin/gt/tpl.h,content=1300>.

³² California Ports, for purposes of this regulation, are ports of: Los Angeles, Long Beach, Oakland, San Diego, San Francisco, and Hueneme.

port and connect the vessel to some other source of power, or use alternative control techniques that achieve equivalent emission reductions.³³

ii. *Cap-and-Trade Program*

A cap and trade program is “an environmental policy tool that delivers results with a mandatory cap on emissions while providing sources flexibility for compliance. Successful cap and trade programs reward innovation, efficiency, and early action and provide strict environmental accountability without inhibiting economic growth.”³⁴ CARB is currently finalizing regulations for its cap-and-trade program.³⁵ CARB identifies its cap-and-trade program as one of the main strategies to reduce emission and projects that the program will ultimately achieve an 80% reduction in GHG emissions from 1990 levels by 2050.³⁶

iii. *Future regulations*

More regulations are still in development, with another regulation adoption goal approaching in January 2011. The AB 32 timeline requires that all regulations that make up the Scoping Plan be in effect by January 2012.

III. PROPOSED CHANGES BY PROPOSITION 23: SUSPEND IMPLEMENTATION OF AB 32 UNTIL UNEMPLOYMENT DROPS TO 5.5%.

Proposition 23 seeks to suspend the operation and implementation of AB 32 regulations until the unemployment rate in California is 5.5% or less for four consecutive calendar quarters.³⁷ A “calendar quarter” is a 3-month period beginning on January 1, April 1, July 1, or October 1. Thus, the proposition would halt California’s current and future efforts to reduce carbon emissions until the unemployment rate is significantly reduced for at least 12 consecutive months.

a. Suspending AB 32 may effect the continued and future implementation of some other state measures.

i. *Regulations that would be suspended if Proposition 23 passes*

In addition to suspending the nine discrete early actions³⁸ adopted to date, Proposition 23 would also suspend the state cap-and-trade program and delay the 2020 Renewable Portfolio Standard.³⁹ The economic effects of this action are described below in Section C.

³³ California Air Resources Board, Shore Power for Ocean-going Vessels, *available at* <http://www.arb.ca.gov/ports/shorepower/shorepower.htm>.

³⁴ Environmental Protection Agency, Cap and Trade, *available at* <http://www.epa.gov/capandtrade/>.

³⁵ Elkind, *supra* note 21 at 19.

³⁶ California Air Resources Board, Cap-and-Trade, *available at* <http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm>.

³⁷ Elkind, *supra* note 21 at 17.

³⁸ See Section II(D)(i)(1-9).

³⁹ Elkind, *supra* note 21 at 19-20.

ii. *Other state measures that would not be affected by Proposition 23*

Not all of the Air Resources Board’s measures to reduce GHG emissions are done under the legal authority of AB 32. Thus, if Proposition 23 passes, other state actions (see below) associated with reducing greenhouse gas emissions that are part of the Scoping Plan but are not done under the authority of AB 32 will remain unaffected by this Proposition. Notably, the Legislative Analyst’s Office estimates that more than half of greenhouse gas emission reduction that would result from the implementation of CARB’s Scoping Plan would be a result of state actions unrelated to AB 32.⁴⁰ Among others, the following measures will presumably still remain in effect:

AB 118

In 2008, the California Energy Commission was authorized to develop the Alternative and Renewable Fuel and Vehicle Technology Program. This program was instituted to reduce GHG emissions from vehicles.⁴¹

AB 1493

AB 1493 (“Pavely”) was another keystone statute, passed in 2002, which gave CARB authority to develop GHG standards for vehicles.⁴² In 2009, CARB adopted amendments to the Pavley regulations, “cementing California’s enforcement of the Pavley rule . . . while providing vehicle manufacturers with new compliance flexibility.”⁴³

Zero Emission Vehicles

This program was adopted in 1990 as part of the Low Emission Vehicle Program. It seeks to “pursue zero emission transportation technologies” in order to reduce greenhouse gas emissions, and reduce dependency on foreign oil.⁴⁴

California Solar Initiative

This program encourages citizens to install solar panels in their homes and businesses. As an incentive, the program offers cash back for the installation.⁴⁵

⁴⁰ LAO Report, *supra* note 15, at 7-8.

⁴¹ 2007 Cal. Stat. ch. 750.

⁴² Elkind, *supra* note 21 at 23.

⁴³ California Air Resources Board, Clean Car Standards – Pavely, Assembly Bill 1493, *available at* <http://www.arb.ca.gov/cc/ccms/ccms.htm>.

⁴⁴ California Air Resource Board, Zero-Emission Vehicle Legal and Regulatory Activities – Background, *available at* <http://www.arb.ca.gov/msprog/zevprog/background.htm>.

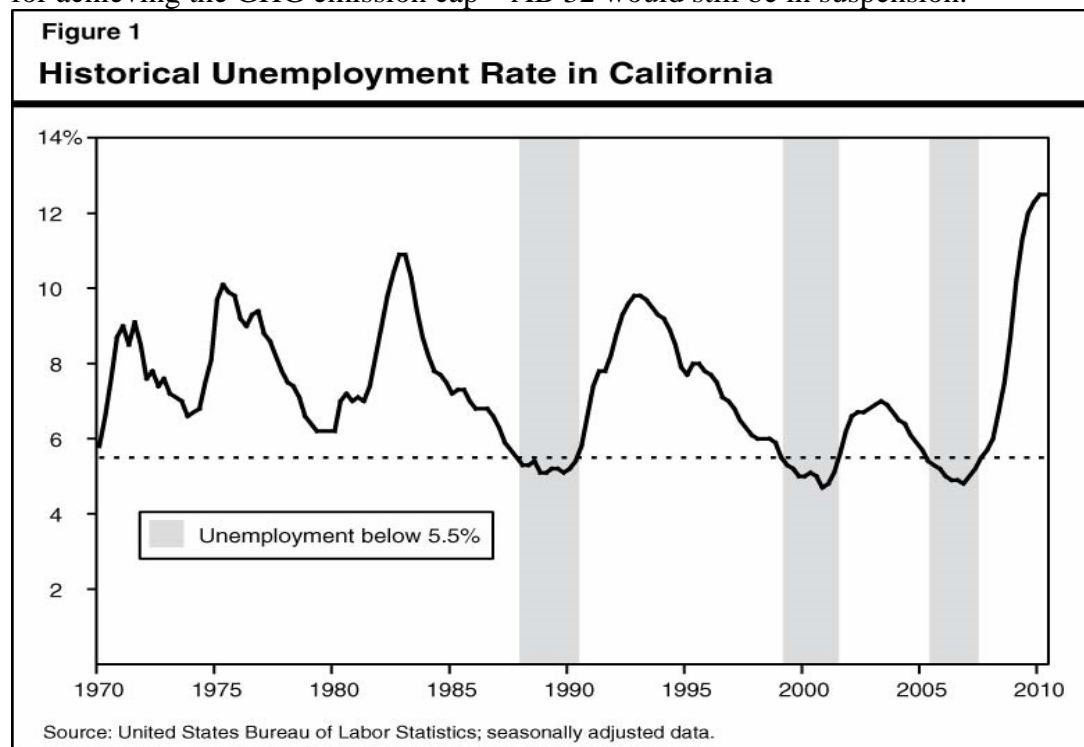
⁴⁵ California Energy Commission & California Public Utilities Commission, The California Solar Initiative – CSI, *available at* <http://www.gosolarcalifornia.ca.gov/csi/index.php>.

High-Speed Rail

The recent passage of Proposition 1A in 2008 approved a bond measure that would finance a construction of a high-speed rail connecting cities in Northern California and Southern California.⁴⁶ On September 30, 2010, the California High-Speed Rail Authority received \$194 million by the Federal Railroad Administration for preliminary engineering and environmental analysis.⁴⁷

- b. It is unlikely that AB 32 will be reinstated in the near future because California has only rarely achieved an unemployment rate of 5.5%.**

Based on the low unemployment rate that Proposition 23 demands, it is likely that the implementation of AB 32 will be suspended for several years. As the diagram below indicates, the unemployment rate has been below 5.5% only three times in the last 30 years. At each of those periods, the unemployment rate remained low for about ten quarters. Experts do not see California achieving this rate in the near future.⁴⁸ During the first two quarters of 2010, the unemployment rate was over 12 percent. Economists project that the unemployment rate will still be over 8 percent in the next five years.⁴⁹ Given this forecast, in 2015 – five years from the original deadline for achieving the GHG emission cap – AB 32 would still be in suspension.



⁴⁶ Elkind, *supra* note 21 at 24.

⁴⁷ Press Release, California High-Speed Rail Authority, \$194 Million Grant to California High-Speed Rail (Sept. 30, 2010) (on file with California High Speed Rail Authority).

⁴⁸ LAO Report, *supra* note 15, at 6.

⁴⁹ *Id.*

c. The economic impact of Proposition 23 is unclear because the economic impact of AB 32 cannot accurately be predicted until its measures are implemented.

There is significant debate among economists, environmentalists, and policy makers over what the impacts of implementing AB 32 regulations will have on California’s economy.⁵⁰ On the other hand, it is just as unclear what kind of impact suspending AB 32 will have on the economy in the long-term.⁵¹

i. Uncertainty over the impact of AB 32 Scoping Plan

There are a number of reasons why authorities have not been able to agree on what the true economic impact of AB 32 will be. First, AB 32’s Scoping Plan is still in development and is not set to be fully complete until January 2012.⁵² Thus, because the Scoping Plan is still in a developmental state, the economic impacts will greatly depend on how the measures are designed in the public regulatory process.⁵³ Second, part of the Scoping Plan is phasing in different measures over an extended period of time. As a result, the economic impacts of such measures would not be felt for several years.⁵⁴ Lastly, implementing the Scoping Plan has the potential to create both positive and negative impacts on the specific sector of the economy.⁵⁵ A number of studies, looking at economic impacts from a broad perspective, have generally concluded that there will be a small reduction in California’s gross state product.⁵⁶ In sum, the debate over whether AB 32 will actually have a positive impact on the overall economy is not known at this time.

ii. Uncertainty over suspending AB 32 Scoping Plan

There is also significant debate over whether suspending the Scoping Plan would improve California’s diminished economic state. Opponents of Proposition 23 believe that suspending AB 32 could be “fatal” to California’s clean technology industry,⁵⁷ while proponents claim that continuing implementation of AB 32 will be detrimental to California’s economy overall.⁵⁸ Studies have been commissioned on both ends and lead to different conclusions as to what the true effect Proposition 23 will be.

It is at least apparent that the passing of the initiative would lead to some direct loss in future employment within the clean technology sector.⁵⁹ The clean technology sector has been a blooming industry in California, especially since the passage of AB 32 in 2006. California’s

⁵⁰ LAO Report, *supra* note 15, at 4.

⁵¹ Elkind, *supra* note 21 at 28.

⁵² LAO Report, *supra* note 15, at 4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Gross state product is a measurement of the economic output of a state. It is the sum of all value added by industries within the state. The gross state product is used as a comprehensive measure of economic activity for the state.

⁵⁷ Clean Economy Network, *Going Backwards: Prop 23’s threat to California jobs, investment, and a clean energy future* (2010) 5, available at www.cleaneconomynetwork.org.

⁵⁸ California Jobs Initiative, *Yes on 23*, <http://www.yeson23.com/> (last visited Oct. 6, 2010).

⁵⁹ Elkind, *supra* note 21 at 28.

Employment Development Department (EDD) reports that the expansion of clean technology has sparked job growth despite California's rising unemployment rate.⁶⁰ Over 500,000 people have been employed in the clean technology sector, with 93,000 employed in manufacturing, and 68,000 in construction.⁶¹

iii. *Economic leakage*

Because AB 32 creates increased demands on various industries in the state, it is likely that its implementation will adversely affect the state's economy with higher energy prices and the need for new investments in order to comply with the regulations' standards.⁶² This will lead to "economic leakage." Economic leakage occurs when the cost of doing business in a place rises, and businesses must adjust by relocating, choosing not to expand, or make other similar types of adjustments.⁶³ This phenomenon tends to have a significant impact on jurisdictions that are small relative to their competitors. It follows that, while economic leakage will likely occur due to the adverse economic impacts of AB 32, it is unlikely that such an effect will be severely detrimental to the state, since California has a very large economy.⁶⁴

iv. *Decreased costs to consumers in certain sectors*

Economic studies commissioned by the California Small Business Roundtable conclude that implementing AB 32 may result in increased costs to consumers.⁶⁵ This is based on the assumption that costs to businesses resulting from complying with the AB 32 regulations will be passed on to consumers.⁶⁶ Increases may occur in five areas: (1) housing, (2) transportation, (3) natural gas, (4) electricity, and (5) food.

Consumers may face an increase of housing costs due to the expense of new housing and possible retrofitting of existing homes in order to adjust to higher costs of utilities. One study commissioned by the proponents of Proposition 23 has estimated that AB 32 would add approximately \$50,000 to the cost of a new home.⁶⁷ There will also be an increase in transportation costs due to consumers having to purchase new cars or have their cars retrofitted to obtain better gas mileage, or paying higher fuel costs.⁶⁸ For new car buyers, this will be an expected expense increase of \$30 per month. Further, the price of natural gas will also increase,

⁶⁰ Clean Economy Network, *Going Backwards: Prop 23's threat to California jobs, investment, and a clean energy future* (2010) 2, available at www.cleaneconomynetwork.org.

⁶¹ *Id.*

⁶² Letter from Mac Taylor, Legislative Analyst, Legislative Analyst's Office, to Hon. Dan Logue, Assembly Member, Third District (May 13, 2010) (on file with the Legislative Analyst's Office).

⁶³ *Id.*

⁶⁴ The Legislative Analyst's Office notes, however, that the ARB's economic model used in creating the Scoping Plan is "not well suited" to analyze economic leakage. *See* Letter from Mac Taylor, Legislative Analyst, Legislative Analyst's Office, to Hon. Dan Logue, Assembly Member, Third District (May 13, 2010) (on file with the Legislative Analyst's Office).

⁶⁵ Sanjay B. Varshney and Dennis H. Tootelian, *Cost of AB 32 On California Small Businesses – Summary Report of Findings*, 31 (June 2009).

⁶⁶ *Id.*

⁶⁷ *Id.* at 32.

⁶⁸ *Id.*

possibly an increase of 7.8%, if not more.⁶⁹ Electricity may also be 11.1% higher than current prices.⁷⁰ Lastly, due to higher costs of transportation and utilities, among other things, the cost of food will also increase for consumers.⁷¹ In suspending AB 32, Proposition 23 would eliminate any potential increase in costs to consumers.

IV. CONSTITUTIONAL ISSUES

Proposition 23 does not directly implicate the Constitution of the United States nor the Constitution of the State of California. However, insofar as it is inextricably linked to the suppression of AB 32, Proposition 23 does indirectly give rise to an issue under the federal Constitution's dormant Commerce Clause.

a. The dormant Commerce Clause makes it unlawful for California to discriminate against out-of-state entities attempting to do business in California.

The dormant Commerce Clause, which functions as a corollary of Article I, Section 8, Clause 3, states, "Congress shall have the power to regulate Commerce with foreign Nations, and among the several States." The purpose of the clause is to ensure the even flow of interstate commerce by preventing discrimination against out-of-state entities that choose to do business in any particular state⁷² and keeping each state from economically isolating itself.⁷³ Where legislation affects economic protectionism, the legislation will more likely than not be struck down as unconstitutional and held invalid.⁷⁴

⁶⁹ Gregory Freeman, Nancy D. Sidhu and Myasnik Poghosyan, *The AB 32 Challenge: Reducing California's Greenhouse Gas Emissions*, 4 (January 2008).

⁷⁰ *Id.*

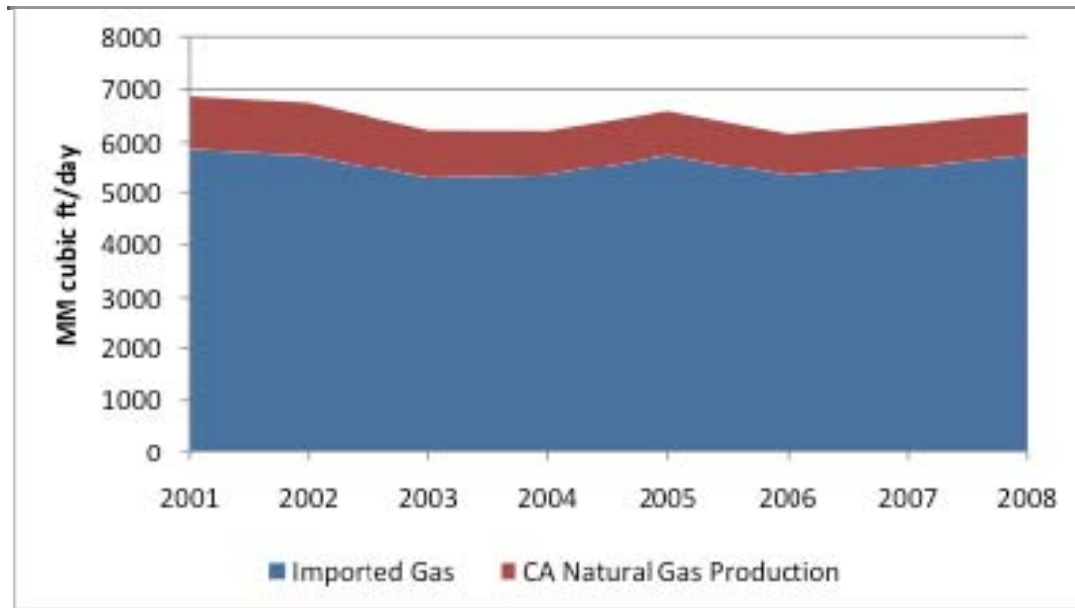
⁷¹ Varshney, *supra* note 63, at 33.

⁷² *United Haulers Assn. v. Oneida-Herkimer*, 550 U.S. 330, 338 (2007).

⁷³ Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 422 (3rd Ed. 2006).

⁷⁴ Cary L. Hartsock, *Grounds for Greenhouse Gas Emission Trading in Agriculture and Potential Constitutional Implications*, 18 San Joaquin Agric. L. Rev. 155, 169 (2008-2009).

b. The effects and burdens of AB 32 cross state lines, thereby implicating the dormant Commerce Clause.



(Source: EIA Natural Gas Summary)

AB 32 seeks to cut down on greenhouse gas emissions by requiring major polluters in the State of California to meet emissions standards set by CARB. As these standards will be burdensome to California businesses more than others, AB 32 contemplates the installment of a “cap-and-trade” program.⁷⁵ Under this program, businesses will be able to buy and sell their emissions permits to each other, and California businesses will be able to obtain additional emissions permits from out-of-state businesses.⁷⁶ Because the permits will be treated like assets or property rights,⁷⁷ the dormant Commerce Clause will be triggered once California businesses begin buying or selling these permits across state lines. The dormant Commerce Clause will also be triggered if California businesses move their operations out of state but continue to supply California with their services. This latter scenario is the “economic leakage” effect, which triggers the dormant Commerce Clause because California is more likely to favor its “home-grown” businesses over foreign companies.⁷⁸

c. Should Proposition 23 fail, California faces possible lawsuits from Alabama, Nebraska, Texas and South Dakota.

Attorney Generals of Alabama, Nebraska, Texas and South Dakota have threatened to sue California under the dormant Commerce Clause if Proposition 23 fails to pass.⁷⁹ California

⁷⁵ Elkind, *supra* note 21 at 10.

⁷⁶ *Id.*

⁷⁷ Letter from Mac Taylor, *supra* note 60.

⁷⁸ *Id.*

⁷⁹ Mark Schapiro, Four States Prepare Legal Assault on California’s Climate Law, *available at* <http://californiawatch.org/watchblog/four-states-prepare-legal-assault-californias-climate-law-4564>.

obtains 30% of its power from beyond its borders with most of it coming from states in the Pacific Northwest and Southwest.⁸⁰ Should Proposition 23 fail, AB 32's emissions standards could threaten to shut out any out-of-state company that is unable to comply with California's set emissions rates, and thus, disrupt the flow of interstate commerce. As AB 32 envisions emission levels more severe than even the federal government contemplates, it is possible that many out-of-state entities will no longer be allowed to conduct business in the state of California unless they cut down their emissions. Should any such shut out occur, the Attorney Generals may argue that AB 32 discriminates against out-of-state business and sue pursuant to the dormant Commerce Clause.⁸¹

d. AB 32 will likely be found constitutional if challenged because it does not facially discriminate against out-of-state businesses and has a legitimate purpose beyond economic protectionism.

If the Attorney Generals challenge the validity of AB 32 in court pursuant to the dormant Commerce Clause, the court will have to determine if AB 32 discriminates against out-of-state businesses on its face or in effect.⁸² If the court finds that AB 32 does discriminate against out-of-state businesses, it will apply a strict scrutiny standard of review to decide whether AB 32 is constitutional, and it will deem the law void if it finds that it is unconstitutional.⁸³ However, if the court finds that AB 32 regulates even-handedly to effectuate a legitimate public interest and that its effects on interstate commerce are only incidental, it will likely uphold AB 32 as constitutional under the looser rational basis standard of review and allow AB 32 to be implemented.⁸⁴ Lastly, if the court finds that the purpose of AB 32 is simple economic protectionism, it will deem AB 32 as per se invalid.⁸⁵

It is unlikely that AB 32 will be found unconstitutional because the purpose of AB 32 is not to isolate California economically, but to combat the effects of global warming, a legitimate government interest.⁸⁶ The Communications Director of CARB recently acknowledged that CARB was aware of possible dormant clause implications and was crafting its regulations to address those concerns.⁸⁷ Should a suit be brought, CARB may point to its multi-state cap-and-trade program with WCI (discussed below) to show that it is working with out-of-state entities, and it may point to its declared intent behind passing AB 32 of exercising a global leadership role and "continu[ing] the tradition of environmental leadership by placing California at the forefront of national and international efforts to reduce emissions of greenhouse gases."⁸⁸

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Cary L. Hartsock, *Grounds for Greenhouse Gas Emission Trading in Agriculture and Potential Constitutional Implications*, 18 San Joaquin Agric. L. Rev. 155, 170 (2008-2009).

⁸³ *Id.*

⁸⁴ *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

⁸⁵ *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

⁸⁶ Mark Schapiro, Four states prepare legal assault on California's climate law, *available at* <http://californiawatch.org/watchblog/four-states-prepare-legal-assault-californias-climate-law-4564>.

⁸⁷ *Id.*

⁸⁸ Cal. Health & Safety Code § 38500 *et. seq.*

V. POLICY ISSUES

Voters choosing to vote for or against Proposition 23 face the difficulty of balancing the desire for a future less reliant on carbon fuels against a slowed economy whose recovery may be negatively impacted by increased costs associated with implementing AB 32. Allowing AB 32 regulations to move forward may cement California’s role as a frontrunner in “green” technology, encourage foreign and domestic investments in our State’s green energy industries, and ultimately promote the health of California citizens by decreasing the amount of pollution in the State. However, passing the initiative may also result in increased costs to businesses as they attempt to meet the Scoping Plan’s lowered emissions standards. This could lead to a spike in California’s unemployment rate as companies are forced to eliminate jobs in order to meet the increased costs of meeting AB 32’s emissions rates.

a. The cost of implementing AB 32 may cause an increase in California’s unemployment rate.

The correlation between California’s unemployment rate and AB 32 is somewhat attenuated. Supporters have dubbed Proposition 23 the “California Jobs Initiative” and advocate passing the proposition on the ground that a temporary suspension of AB 32 will prevent job losses across California. This correlation is not unreasonable because CARB’s Scoping Plan does contemplate regulations that will result in increased costs to California businesses and could likely force businesses to re-evaluate their expenditures, including the number of positions they offer.⁸⁹ However, passing Proposition 23 will not necessarily decrease California’s current unemployment rate by creating jobs, and failing to pass Proposition 23 will not necessarily result in job cuts. Realistically, temporarily suspending AB 32 will simply preserve the status quo of California’s job market by allowing businesses to carry on in their current conditions for the time being.

AB 32 will impact California’s economy by mandating new measures in various business sectors, including energy, construction, transportation and industry. CARB seeks to install solar electric systems in new homes and businesses under the Million Solar Roofs Program, proposes measures to increase California’s RPS from 20% to 33%, and intends to implement various building and appliance efficiency measures, such as installing programmable thermostats in new and refurbished buildings.⁹⁰ Additionally, CARB proposes combined heat and power systems, provides incentives for the installation of a solar water heating system, and intends to implement the Pavley standards (AB 1493) in order to reduce greenhouse gas emissions from passenger vehicles by about 22%.⁹¹ Indeed, many of these proposals may result in increased costs to California businesses.

However, increased costs to businesses may not necessarily result in automatic job loss. California is one of the largest consumer states in the western half of the United States, and it is possible that businesses will shift the higher costs associated with energy prices onto consumers, workers or

⁸⁹ See Section II(C) (1-9).

⁹⁰ Varshney, *supra* note 63, at 35.

⁹¹ California Air Resources Board, AB Scoping Plan, *available at* <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm>.<http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm> [hereinafter AB Scoping Plan].

shareholders before they begin to eliminate jobs.⁹² Furthermore, transitioning to alternative fuels may spur new jobs in California's research and technology sectors.⁹³ There are already 12,000 clean technology companies in California⁹⁴ and currently 500,000 employees working in clean technology jobs.⁹⁵ Additionally, "green" jobs are continuing to expand all over the state⁹⁶ because the clean technology sector receives billions of dollars in venture capitalist investment.⁹⁷ Clean-energy jobs currently make up a key portion of California's available jobs and are expected to remain an integral part of the job market as AB 32 takes effect.⁹⁸

In conclusion, while the loss of jobs may be a consequence of implementing AB 32, it is not a foregone conclusion.

b. Temporary suspension of AB 32 may negatively impact the health of California citizens by allowing emissions level to remain unchanged.

Another major policy concern underlying Proposition 23 is the effect that suspending environmental reform will have on the health of Californians. Air pollution is a major threat to public health in California,⁹⁹ but Proposition 23 would put a hold on AB 32's proposed environmental reforms and allow the current emissions levels to remain in place. These levels are particularly concerning to African Americans and Latino Americans because they tend to live closer to sources of industrial pollution, and to children and immigrants living in poverty-stricken areas (see "Figure 2" below). AB 32 seeks to lower overall emissions, and its implementation would undoubtedly be beneficial to the health of Californians in the long term once pollution levels decrease and the air quality improves. However, AB 32 may not have the positive short-term impact on pollution levels that CARB anticipates. AB 32's cap-and-trade system, in driving down pollution levels through a market-based system, may allow industries already releasing the highest amount of emissions to buy their way out of immediately reducing any of their emissions levels. In such a case, emissions levels will remain as they are even if Proposition 23 fails, and the state of Californian's health will not be significantly improved.

⁹² Letter from Mac Taylor, *supra* note 60.

⁹³ *Id.*

⁹⁴ Clean Economy Network, Resources, *available at* <http://cleaneconomynetwork.org/resources>.

⁹⁵ Employment Development Department – Labor Market Information Division, *California's Green Economy*, Powerpoint Lecture, April 2010.

⁹⁶ Collaborative Economics and Next 10, Many Shades of Green, *available at* http://nextten.org/next10/publications/green_jobs.html.

⁹⁷ Cleantech Group, LLC, Research on Clean Technology, *available at* <http://cleantech.com>.

⁹⁸ George P Shultz, *Viewpoints: Clean air law is key to our future*, Sacramento Bee, Sept. 12 2010, at E1.

⁹⁹ California Air Resources Board, AB Scoping Plan, *available at* <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm>*supra* note 89.

Public Health Benefits of AB 32 Scoping Plan in California in 2020 (Including Transportation, Electricity and Natural Gas Sectors)		
Health Endpoint	Avoided Impacts in Year 2020 (mean)	Value (mean, in millions of dollars)
Premature Death	780	\$4,300
Hospitalization (respiratory)	87	\$2.0
Hospitalization (cardiovascular)	170	\$4.8
Asthma and other Lower Respiratory Symptoms	17,000	\$0.1
Acute Bronchitis	980	\$0.3
Work Loss Days	77,000	\$10
Minor Restricted Activity Days	450,000	\$17
TOTAL:		\$4,400

Sources: Climate Change Scoping Plan Appendix M, California Air Resources Board, December 2008. Health impacts values are in 2007 dollars and were calculated using the health impacts assessment methodology in NRDC *Boosting the Benefits* report, June 2008.

High emissions levels are particularly dangerous for those living in poverty-prone areas, and they tend to affect African Americans, Latino Americans and immigrants more than Asians and Caucasians.¹⁰⁰ Five of the smoggiest cities in California have the highest densities of people of color and low-income residents,¹⁰¹ and on average, people of color are exposed to 70% more of the dangerous particulate matter linked to greenhouse gas pollution than white people.¹⁰² The Latino community is also adversely impacted, as more than half of Latinos live within one or two miles of a Toxic Release Inventory facility tracked by the EPA.¹⁰³ In many Latino neighborhoods, asthma rates are four times the national average and 1 in 6 Latinos are diagnosed with asthma.¹⁰⁴ Beyond race and ethnicity, immigrants and youth are also affected. Immigrants from the 1980s and 1990s are overrepresented in areas six miles or closer to major polluters, and children in poverty are disproportionately near facilities.¹⁰⁵ In general, there are more renters, lower per capita incomes, and lower household incomes near polluting facilities.¹⁰⁶

¹⁰⁰ *Id.*

¹⁰¹ Manuel Pastor, *Minding the Climate Gap: What's at Stake if California's Climate Law isn't Done Right and Right Away*, 10 (April 2010).

¹⁰² *Id.*

¹⁰³ Manuel Pastor, James Sadd, Rachel Morello-Frosch, *Still Toxic After All These Years: Air Quality and Environmental Justice in the San Francisco Bay Area*, 6 (2007)

¹⁰⁴ Manuel Pastor, *Minding the Climate Gap: What's at Stake if California's Climate Law isn't Done Right and Right Away*, 15 (April 2010).

¹⁰⁵ *Id.* at 10.

¹⁰⁶ *Id.*



(Source: *Minding the Climate Gap*)

The cap and trade system, while seeking to reduce overall emissions over time, may not necessarily benefit the communities most impacted by high pollution rates in the short-term. The lowered emissions rates would place the heaviest strain on top-emissions industries by forcing them to considerably improve their rate of emissions; however, the cap-and-trade system will allow these industries to buy more emissions permits and allowances and thereby delay lowering their high emissions rates.¹⁰⁷ Because the cap-and-trade program contemplates a market-based system for lowering emissions, AB 32 may not have a positive impact on high polluters at all and the communities surrounding major sources of pollution may continue to experience adverse health effects.¹⁰⁸ Certain trades or allowance allocations could result in a disproportionate burden on poverty-prone communities as the facilities already emitting less pollution meet the more stringent emissions levels and sell their permits to the higher polluters.¹⁰⁹

The bottom line is that Proposition 23 may not necessarily impact the health of California citizens one way or the other. Passing the initiative will allow emissions to remain as they are for the time being, which means that communities already suffering from the health effects of pollution will continue to suffer from the health effects of pollution. Allowing AB 32 regulations to move

¹⁰⁷ Letter from Mac Taylor, *supra* note 60.

¹⁰⁸ Manual Pastor, *Minding the Climate Gap: What's at Stake if California's Climate Law isn't Done Right and Right Away*, 20 (April 2010). Pastor, *supra* note 101, at 20.

¹⁰⁹ *Id.* at 21.

forward may result in an overall improvement to the health of Californians once state-wide emissions are lower.¹¹⁰ However, the short-term health benefits, especially in the less affluent communities, may not be drastic. As with the unemployment rate, Proposition 23 will simply preserve California's status quo with regard to pollution-related health problems.

c. Passing Proposition 23 could lead to conflicting emissions regulations among various California industries and disrupt a regional cap-and-trade program involving several western U.S. states and Canada.

A further policy concern underlying Proposition 23 is that disrupting environmental regulations by suspending AB 32 will result in a nationwide ripple effect on progressive environmental legislation. California's more stringent emissions guidelines could result in economic leakage across state lines,¹¹¹ and a corollary to this effect would be the slowing or abandonment of environmental regulation by other states as they experience an economic high from California's newly re-located businesses. Moreover, if nationwide environmental progress isn't stagnated by AB 32, allowing AB 32 to go forward may cause inconsistent nation-wide emissions standards, as California's proposed emissions are more stringent than even federal regulations.¹¹² These varying regulations may impact interstate commerce.¹¹³

The cap-and-trade program contemplated by AB 32 is not limited to California's borders, and California has already developed a regional cap-and-trade program with Western Climate Initiative that is designed to link with the state and provincial-level programs of other WCI jurisdictions.¹¹⁴ Under this program, California businesses will be able to trade emissions permits with other western U.S. states as well as within California, and it will also have access to permits in some provinces of Canada, including British Columbia, Ontario and Quebec.¹¹⁵ Other states and provinces, such as New Mexico and Manitoba, are in the process of developing legislation to authorize similar cap and trade programs for their jurisdictions.¹¹⁶ Should Proposition 23 suspend AB 32, California may be forced to withdraw from its agreement with WCI and thereby sever a uniform cap-and-trade agreement between several states.

Since California's progressive environmental policies are believed to have attracted investors to California,¹¹⁷ the State risks losing billions of dollars by suspending AB 32. Clean energy investment in California has tripled since 2006 when AB 32 was first passed, and about three of

¹¹⁰ *Id.* at 21.

¹¹¹ See Section III(d), *supra*.

¹¹² Maeve Reston, *California Election 2010*, L.A. Sept. 11, 2010, at LATExtra.

¹¹³ See Section IV, *supra*.

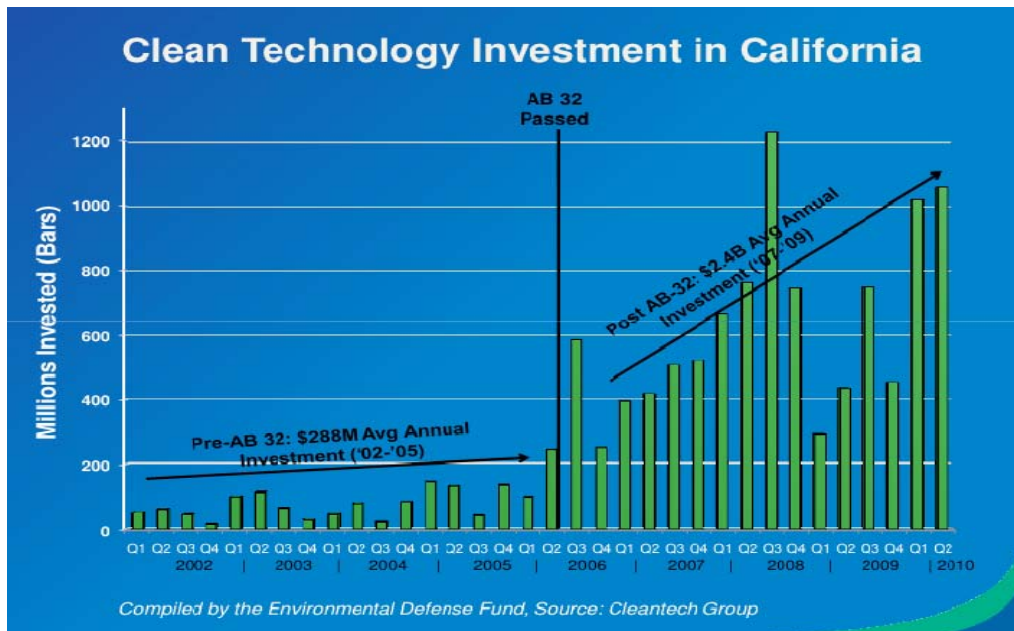
¹¹⁴ Ethan Elkind, Daniel Farber, et al., *California at the Crossroads: Proposition 23, AB 32, and Climate Change*, 10 (U.C. Berkeley School of Law's Center for Law, Energy & the Environment, Sept. 2010). Elkind, *supra* note 21 at 10.

¹¹⁵ *Id.* at 10-11.

¹¹⁶ New Mexico Environment Department, *New Mexico Climate Change Initiatives*, available at <http://www.nmenv.state.nm.us/cc/>.

¹¹⁷ George P. Shultz, *Viewpoints: Clean air law is key to our future*, Sacramento Bee, Sept. 12, 2010, at 1E.

every five venture capital dollars nationwide has been invested in California companies.¹¹⁸ California has also gained in about \$2.1 billion worth of clean energy investment in just 2009.¹¹⁹ If California were to stall on environmental legislation by suspending AB 32, California may lose many of these investments to other states or even to other countries,¹²⁰ while jeopardizing its reputation as a frontrunner in environmental legislation. Furthermore, suspending AB 32 may encourage various State agencies to make their own emissions regulations, which could result in piecemeal litigation that may make it difficult for out-of-state entities to do business in California.¹²¹



Ultimately, AB 32 may affect environmental legislation across state borders whether or not Proposition 23 passes. Suspending AB 32 may cause environmental policies to stagnate nationwide, and passing AB 32 will affect the several states as economic leakage and high varying emissions standards become a reality.

VI. CONCLUSION

Proposition 23 essentially seeks to preserve the pre-January 1, 2012 status quo of environmental regulations in order to prevent businesses from undergoing costly changes to their modes of operation. Proponents of the initiative raise the argument that forcing businesses to undergo major changes in operation to meet AB 32’s stringent emissions standards will result in a drastic cutback of available jobs. As this summary has discussed in some detail, this argument is not unreasonable

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Maeve Reston, *Boxer assails Fiorina over global warming law rollback*, L.A. Times, Sept. 11, 2010, available at <http://articles.latimes.com/2010/sep/11/local/la-me-0911-senate-20100911>.

¹²¹ Steven Maviglio, *UC Study: Prop 23 Kills Jobs, Hurts Cities, Causes Legal Chaos*, available at <http://www.californiaproggressreport.com/site/?q=node/8146>.

because it is feasible that businesses could cut back on jobs in order to save on operational costs. However, eliminating jobs is not the only option California businesses will have. It is possible that consumers, shareholders or even investors may take the hit of increased costs to businesses before existing or potential employees do, and it is also possible that implementing AB 32 will lead to an eventual decrease in the unemployment rate as new “green jobs” are made available.

Those who oppose Proposition 23 do not see the connection between suspending AB 32 and lowering California’s unemployment rate. They argue that the initiative is backed primarily by out-of-state oil companies whose interests lie solely in ensuring that California maintains its dependency on oil. A major reason for enacting AB 32 was to establish California as a leading force in the worldwide mission to combat global warming, and opponents argue that implementing AB 32 regulations will help California’s economy in the long-term as more businesses continue to invest in its continuously growing clean technology sector. However, if Proposition 23 passes, it will threaten the current and emerging jobs throughout the new clean technology sector and businesses may choose not to invest in clean technology any longer, thereby withdrawing their financial support from California. Opponents also believe that the threat of global warming is a serious concern that must be addressed. Proposition 23, they argue, will indefinitely suspend California’s major regulations that are necessary to reduce its greenhouse gas emissions.

In sum, California voters must choose between implementing progressive environmental measures and revitalizing an economy that may be acutely impacted by AB 32.