Case No. S177823

In the Supreme Court of the State of California

NATIONAL PAINT & COATINGS ASSOCIATION, INC.,
Plaintiff and Appellant,

vs.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT
Defendant and Respondent.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Three, Case No. G040122

Appeal From The Superior Court of the State of California
Orange County Superior Court, Honorable Ronald L. Bauer
Case No. 03CC00007

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Legislature has declared that rules and regulations adopted by defendant and respondent South Coast Air Quality Management District ("District") to meet state and federal clean air standards must "require the use of best available control technology for new and modified sources and the use of best available retrofit control technology for existing sources." Health and Safety Code section 40440 (b)(1). The Court of Appeal's published opinion, *National Paint & Coatings Association v. South Coast Air Quality Management District*, 177 Cal.App.4th 1494 (2009), correctly determined that the District was required to comply with section 40440(b)(1), and that in order to do so, rules imposing emissions limitations on existing sources may only require the use of "available" technology. In particular, the court held that the rule challenged by plaintiff and appellant National Paint & Coatings Association, Inc. ("NPCA"), which imposed limitations on the volatile organic coatings content of a variety of paints and coatings, was valid only insofar as technology existed at the time of rule adoption that allowed paint manufacturers to formulate coatings that complied with the proposed limits.

According to the Petition, review is necessary in this case in order for this court to resolve "important questions of law" arising from "significant errors of law" in the Court of Appeal's opinion "that threaten to hamstring efforts to control harmful air pollution in the state's most populous region." The first assertion is incorrect. The second finds no support in the record. The Petition should be denied.

Should, however, this Court accept review of the issues identified in the Petition, NPCA requests that it also address the question of whether a finding of "availability" made on a generic basis as to a category of products, or only as to certain products within a heterogeneous category of products, is sufficient under the best available retrofit control technology standard for the entire category.

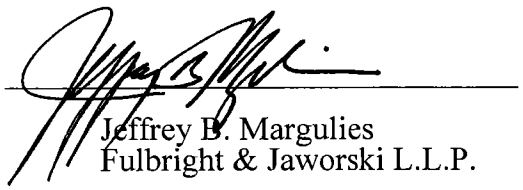
CERTIFICATE OF INTERESTED ENTITIES

Counsel for plaintiff and appellant National Paint & Coatings Association, Inc. certifies the following to the best of his knowledge:

National Paint & Coatings Association, Inc., ("NPCA") is a non-profit corporation. Subsequent to the filing of its Certificate of Interested Entities in the Court of Appeal, NPCA merged with the Federation of Societies for Coatings Technology (FSCT). As of January 1, 2010, the non-profit corporation now known as National Paint & Coatings Association, Inc. will be known as the American Coatings Association.

There are no parent corporations or publicly held companies that own 10 percent or more of the stock of this party.

November 30, 2009



Jeffrey B. Margulies
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II. THE PETITION PRESENTS NO BASIS FOR REVIEW IN THIS COURT

A. The Court of Appeal's Opinion was Legally Correct.

The District complains of two separate aspects of the opinion below. First, it says the court erred in concluding that the Legislature "limited" the District's authority to allowing it only to require best available retrofit control technology – "an emission limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts" – under Health and Safety Code sections 40440(b)(1) and 40406, when it imposes emissions limitations on existing sources.[1] Second, it claims that the court wrongly concluded that the definition of best available retrofit control technology requires the District to limit its rulemakings to technology that is "available" at the time.

In support of these contentions, the District repeats arguments it made below. It asserts that, despite requiring the "maximum" achievable reduction, the Legislature really intended that best available retrofit control technology be a "minimum" standard. It claims that the best available retrofit control technology standard "does not require that compliant coatings be already existing in each category when the Rule was approved, although the existence of compliant coatings is probative of achievability." Respondent's Brief ("RB") at 43, citing *National Paint & Coatings Association v. South Coast Air*

[1] Acknowledging the maze of acronyms that plagues this area of law and can render briefs difficult to read (see footnote 1 of the opinion below), NPCA will attempt to avoid such acronyms as far as possible.

Quality Management District, 485 F.Supp.2d 1153, 1159 (C.D. Cal. 2007) (referenced in the opinion below as *National Paint Association II*).[2]

In response to these and NPCA's countervailing arguments, the Court of Appeal noted that that the parties' arguments "serve only as images of competing legislative models, they cannot tell what our *Legislature* actually intended. To do that, we must actually examine *the words of the relevant statutes*." 177 Cal.App.4th at 1514 (emphasis in original).

The District would be hard-pressed to assert a fundamental error with this approach, since "the first principle of statutory construction requires [a court] to interpret the words of the statute themselves, giving them their ordinary meaning, and reading them in context of the statute...as a whole." *In re Tobacco II Cases*, 46 Cal.4th 298, 315 (2009); *see also Hughes v. Pair*, 46 Cal.4th 1035, 1045 (2009) ("In construing the terms...we apply well-established rules.... We begin with the statutory language, which is usually the most reliable indicator of legislative intent.").

The opinion engages in a detailed examination of the statutory language, assessing the meaning of "best," "available," and "achievable," even contrasting "achievable" with "achieved." It ultimately concludes that these words require the District to promulgate rules based on "*existing* technology." 177 Cal.App.4th at 1516 (emphasis in original).

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[2] One procedural aside: because the procedural history of *National Paint Association II* was not relevant to the appeal, and thus not in the record, the Court of Appeal appears to have misunderstood the relationship between the federal case and the instant case. *National Paint Association II* challenged a rulemaking by the District in 2003 that involved different coatings; both cases had been separately removed to federal court. The 2002 rulemaking (this case, or as referenced by the Court of Appeal, *National Paint Association III*) was remanded to Superior Court. *National Paint Association II* remained in federal court and was ultimately decided by District Judge Pregerson. Because these facts were not germane to the Court of Appeal's legal determinations on the merits, NPCA did not seek rehearing in the Court of Appeal to correct the opinion.

The court tested this interpretation in light of the larger statutory scheme within which sections 40405, 40406, and 40440 are located, because "[s]tatutes which are part of the same scheme should be construed together." *Id.* at 1517 (citations omitted). To do so, it considered sections 40723, 40703, 40922, and 40440.11. The court concluded that each of these sections used the same language as section 40440 to mean existing technology – not conceivable technology. *Id.*

The court also examined two other published appellate decisions in which the meaning of "best available" was considered in the context of the new or retrofit technology: *Western States Petroleum Association v. South Coast Air Quality Management District*, 136 Cal.App.4th 1012 (2006), and *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist.*, 229 Cal.App.3d 110 (1991). *Id. at* 1510-11. In both cases, the courts had determined that "the common, ordinary sense of the words 'best' and 'available' ... [mean] something that exists – rather than something that *might* one day be expected *to* exist." *Id.* at 1511 (emphasis in original).

The Petition sets forth a number of reasons why the District believes the Court of Appeal should have adopted its preferred interpretation of the relevant statutes. For example, the District argues that the court improperly "grafted" a temporal limitation onto the meaning of "achievable," but the only support for this statement is a curious citation to an irrelevant MSNBC.com article about the war in Afghanistan. Petition at 20. The District argues that the court's definition "makes no sense in the statutory context" (Petition at 21), although the opinion discussed extensively why its conclusion was consistent with "the statutory scheme of which sections 40405, 40406, and 40440 are a part." 177 Cal.App.4th at 1517-1520. The Petition asserts that the court's construction is inconsistent with legislative history (Petition at 39-40). As the Court of Appeal found no ambiguity in the language of the statutes, it did not need to resort to an analysis of its legislative history. Had it done so, the legislative history of SB 151 (Stats. 1987, ch. 1301) – the legislation that

introduced the best available retrofit control technology requirement – supports the conclusion reached by the Court of Appeal. As noted by NPCA in its brief below, the legislative history demonstrates that the Legislature intended to limit the disruption and cost that could be created if existing sources were required to meet the much more stringent "best available control technology" standard that is required for new sources[3] (see Appellant's Reply Brief (ARB) at 12-14), a point that is in fact echoed in the opinion.[4] 177 Cal.App.4th at 1518.

The District's real disagreement with the Court of Appeal's construction is illustrated by its claim that the opinion will obstruct the District's efforts to fight air pollution. This assertion is not supported in the record, and, even if the District could prove that the Legislature did not provide sufficient authority to combat air pollution, that issue presents no basis for review in this Court.

B. Limiting a District to Requiring Available Technology When Regulating Existing Sources is Not an Unsettled Question of Law

The District advances a number of arguments to support its claim that the Court of Appeal's opinion is deserving of review. Although the Petition does not assert that there is a conflict in the reported appellate decisions, it

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[3] In addition to requiring best available retrofit control technology for existing sources, section 40440(b)(1) requires "best available control technology" for new or modified sources, That term, in turn, is defined as "an emission limitation that will achieve the lowest achievable emission rate" Section 40405.

[4] The District asserts that NPCA agrees with its definitions of "achievable." (Petition at 24.) This argument misstates NPCA's position. NPCA never agreed that a rulemaking could be based on technology that was not "available." As it stated below, NPCA agrees that the District can adopt a "technology-forcing" requirement if the implementation of that technology is achievable by the effective date. See Appellant's Opening Brief (AOB) at 25. However, "the statutes do not allow SCAQMD to 'force' the use of technology that has never been shown to be effective for an application." AOB at 26.

posits several false conflicts in order to create an impression, albeit unsupported, that the law is unsettled.

The District argues that the court's opinion results in the conclusion that districts with clean air have "open-ended regulatory authority," but more polluted districts are constrained to require only available technology. Petition at 5-6. This argument borders on frivolous. A proposed district regulation must be based on separate findings of "authority" and "necessity." Section 40727 (a). The District does not explain how a district with clean air could establish either the authority or the necessity to require the use of technology that does not exist, in order to eliminate air pollution that does not exist.

The District asserts that the Court of Appeal's narrow definition of "availability" would allow industries to set their own regulatory standards, thus conflicting with the decision in *The Sherwin-Williams Company v. South Coast Air Quality Management District*, 86 Cal.App.4th 1258, 1280 (2001). Petition at 6-7. This is another false conflict, as the *Sherwin-Williams* court was responding to the assertion "that market forces should be left to drive the trend toward increasing the percentage of architectural coatings that are waterborne, and that government should not have a hand in regulating the content of paint." 86 Cal.App.4th at 1279. NPCA has never asserted that SCAQMD has no authority to regulate VOC content in paints, and agrees that government can "regulat[e] the content of paint" by requiring the use of available low-VOC technology that will address clean air requirements. Moreover, this false conflict founders on the presumption that the paint and coatings companies will not seek to innovate and produce lower-VOC products simply because the District is not authorized to force the use of hypothetical technology.

The District next claims that the opinion imperils existing regulations, such as the RECLAIM trading regulation that was discussed in *Alliance of Small Emitters/Metals Industry v. South Coast Air Quality Management Dist.*,

60 Cal.App.4th 55 (1997) ("*Alliance of Small Emitters*"). Petition at 7-8. RECLAIM is a market incentive (or "cap-and-trade") program, not a "command-and-control" method, such as Rule 1113. 60 Cal.App.4th at 57-58. It is governed by section 39616, which requires it to achieve emissions reductions comparable to command-and-control schemes. *Alliance of Small Emitters* did not address the issue of technological feasibility: "only two issues are before this court: whether the SCAQMD adequately analyzed the economic effects and whether it properly analyzed the environmental effects of its RECLAIM air pollution control program." 60 Cal.App.4th at 61. Whether and how RECLAIM might be impacted by the Court of Appeal's construction of section 40440(b)(1) is a question for another day.

Finally, the District asserts that the opinion does nothing less than imperil the state's compliance with the federal Clean Air Act ("Act"), because it could "deprive the District of adequate authority" to implement measures in the State Implementation Plan ("Plan"). Petition at 8-10. The District does not offer any concrete basis upon which to conclude that the U.S. Environmental Protection Agency ("EPA") can or will disapprove the previously-approved Plan, or that disapproval will have any incurable impact deserving of this Court's intervention.

The Act created "a federal-state partnership for the control of air pollution," *Abramowitz v. EPA*, 832 F.2d 1071, 1073 (9th Cir. 1987), also referred to as "cooperative federalism." *See Friends of the Earth v. Carey*, 552 F.2d 25, 37-38 (2d Cir. 1977); *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976) ("[T]he State may select whatever mix of control devices it desires, and industries with particular economic or technological problems may seek special treatment in the plan itself.") (internal citations omitted).

Under section 110 of the Act, each state is responsible for developing a Plan "which provides for implementation, maintenance, and enforcement . . . in each air quality control region." 42 U.S.C. section 7410(a). The Plan must provide "necessary assurances that the State" or "a regional agency designated

by the State" such as SCAQMD has "authority under state . . . law to carry out such implementation plan . . . ." 42 U.S.C. section 7410(a)(2)(E)(i). If a State does not want to submit a Plan that complies with the Act, it cannot be required to adopt a particular control measure, and the burden falls on the federal government. *See Maryland v. EPA*, 530 F.2d 215, 228 (4th Cir. 1975). EPA has "no authority to question the wisdom of a State's choices of emissions limitations," so long as the Plan satisfies section 110 of the Act. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). Here, the California Legislature delegated some of its authority to SCAQMD to adopt and implement a Plan, but the state ultimately retained the responsibility for compliance.

Federal circuit court decisions disagree with the District's conclusion that disapproval under state law of a control measure in an approved Plan creates a conflict with the Act. *See Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1551 (7th Cir. 1983) (a Plan becomes enforceable federal law only if the plan is adopted in accordance with state law); *New Mexico Environmental Improvement Division v. Thomas*, 789 F.2d 825, 828 (10th Cir. 1986) ("When the approved Plan contains an element that is invalidated by virtue of state law, adoption by the EPA is also invalidated. The status is as if the state had not submitted a Plan."). Where an emission limit is challenged as invalid under state law, the remedy that Congress intended for noncompliance with the Plan is EPA action, by way of a demand for a revised Plan, or the adoption of a federal implementation plan. *Sierra Club*, 716 F.2d at 1153. There is nothing at all unsettled about the law on this issue.

The District has not established that the decision below warrants review pursuant to California Rules of Court, Rule 8.500(b). Accordingly, the Court should deny the Petition.

III. ADDITIONAL ISSUE PRESENTED FOR REVIEW

If the Court accepts the District's petition, NPCA requests that it address the following additional issue:

> Where an emissions limitation promulgated by an air pollution control district applies to a category of products, and where the record demonstrates that the limit is not achievable with available technology for all products within the category, has the district complied with the requirement to utilize best available retrofit control technology?

The Court of Appeal correctly construed the best available retrofit control technology standard to require the use of available technology, but its determination that the standard is satisfied if there is but one compliant product in a heterogeneous or generic category of products grouped together for regulatory purposes is contrary to the language of section 40406. Its reasoning conflicts with other decisions and invites districts to develop generic categories in future rulemakings to avoid the clear legislative mandate that technology be available.

Section 40406 defines best available retrofit control technology as "an emissions limitation that is based on the maximum degree of reduction achievable, taking into account environmental, energy, and economic impacts by each class or category of source." The Court of Appeal dealt with the term "source" by stating that "if the district's rule directed at the paint or coating–as distinct from whatever the paint or coating is put on–is within the authority of the statute, that is enough to comply with the statute." 177 Cal.App.4th at 1512.

But this conclusion begs the question of how the District may properly categorize "sources" by type of paint or coating. The categories at issue in this case included one type of coatings that was described by *where* they were used (industrial maintenance coatings), one that was described by the *surface* on which it was applied (floor coatings), three that were described by *what* they

did (quick-dry enamels; primers, sealers, and undercoaters; rust-preventative coatings), and one that was described by its *gloss level* (nonflat coatings). The categories themselves varied in their level of uniformity, with the industrial maintenance category being the most elusive of categorization for "availability" purposes. As described by the District in the administrative record, this latter coating category "is a generic coating for a variety of high performance coatings used in areas with harsh environmental conditions such as extreme weather, corrosion, chemical, abrasion, and heat. Typical users include oil and gas production – onshore and offshore, refineries, petrochemical production and processing, marine, pulp and paper mills, bridges, manufacturing facilities, and water and waste treatment facilities." 1 AR 182.

If, for example, chemical storage tank coatings do not perform acceptably at a proposed emissions level for industrial maintenance coatings, but bridge coatings do perform acceptably at that level, then the definition of best available retrofit control means that the technology is not available for the chemical storage tank coatings, and these coatings should not be subject to the same standard as the bridge coatings simply because the District has placed the two coatings in the same "industrial maintenance" category. Under the Court of Appeal's conclusion, however the District properly avoided determining whether the proposed limits for industrial maintenance coatings was achievable for oil and gas production, refineries, marine, pulp and paper mills, etc. So long as there is a coating that is "available" within the heterogeneous regulatory category of products, the inquiry is concluded.

The Court of Appeal's interpretation of how the best availability standard is actually *applied* to a "category" of sources leaves the door open for arbitrary and capricious rulemaking, an issue raised by NPCA in its appellate briefs. There was uncontradicted evidence in the record that certain types of coatings within the regulatory categories would not perform acceptably at the lower VOC limits. Rather than determining whether each category was

arbitrarily drawn in light of the emissions limitations (and upholding it to the extent it was based on available technology), the Court of Appeal concluded that the presence of a single compliant coating ended the inquiry. The logical consequence of the opinion is that *any* category that can be defined by a District can support a best available retrofit control technology standard if technology for any one coating within that category exists.

Contrary to the court's conclusion, requiring the District to engage in a specific evaluation of achievability and availability does not create an impossible standard, and this approach complies with the legislative mandate in sections 40440(b)(1) and 40406 to assess technology "by each class or category of source." If the Court of Appeal's conclusion that the District may only require available technology, then the technology must be available for the entire class or category of products being regulated. Otherwise, the category itself becomes arbitrary.

In this regard, the opinion conflicts with existing case law. In *Western States*, for example, the court upheld a District rule affecting existing refineries because "[t]he experts consulted by the District and WSPA agreed that given the right circumstances [the rule] is achievable [at all of the refineries] with existing technology." 136 Cal.App.4th at 1019. While the court refrained from deciding whether the District had additional authority, it seemed apparent from the decision that if the technology could not be used at all of the refineries, then it would not have been "achievable."

Other courts construing air pollution control rules have vacated agency rulemaking where the record did not support the conclusion that technology was available for the entire regulated category. For example, in *Commonwealth Edison Co. v. Pollution Control Bd.*, 25 Ill.App.3d 271, 287-88, 323 N.E.2d 84 (1974), *aff'd in part and rev'd in part on other grounds*, 62 Ill.2d 494, 343 N.E.2d 459 (1976), the court held that the record must demonstrate technical feasibility "for a substantial number of the individual emissions sources in this State to comply by the specified deadline," and that

"[w]ithout any evidence that the needed systems are beyond the conceptually workable stage of development," the proposed rule was invalid. 25 Ill.App.3d at 287-88.

In *National Lime Assn. v. EPA*, 627 F.2d 416 (D.C.Cir. 1980), the court vacated a rulemaking in which EPA failed to demonstrate achievability for emissions limitations in an entire industry. The court noted that "Promulgation of standards based upon inadequate proof of achievability would defy the Administrative Procedure Act's mandate against action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 627 F.2d at 433. According to the court, "an initial burden of promulgating and explaining a non-arbitrary, non-capricious rule rests with the Agency and we think that by failing to explain how the standard proposed is achievable under the range of relevant conditions which may affect the emissions to be regulated, the Agency has not satisfied this initial burden." *Id.*

Even under more liberal technology-forcing statutes, such as the federal Occupational Safety and Health Act, courts have rejected rulemakings in which feasibility determinations within categories have been undertaken in a generic fashion.[5] In *AFL-CIO v. Occupational Safety & Health Admin.*, 965 F.2d 962, 981-82 (11th Cir. 1992), the court vacated a rulemaking where the agency "made no attempt to show the ability of technology to meet specific exposure standards in specific industries . . . [and] merely presented general conclusions as to the availability of these controls in a particular industry." The court held that OSHA does not have "a license to make overbroad

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[5] The federal Occupational Safety and Health Act "requires that an OSHA standard be both technologically and economically feasible." *Asarco, Inc. v. Occupational Safety & Health Admin.*, 746 F.2d 483, 495 (9th Cir. 1984) (citation omitted). This standard does not restrict OSHA "to the state of the art in the regulated industry," but requires it to develop "evidence that companies acting vigorously and in good faith can develop the technology," before requiring that industry comply with standards "never attained anywhere." 746 F.2d at 495 (emphasis in original, citations and internal quotation marks omitted).

generalities as to feasibility" and cannot "group large categories of industries together" without evidence to support the conclusion that "findings for the group adequately represent the different industries in that group." *Id.* In *Color Pigments Mfrs. Assn., Inc. v. Occupational Safety & Health Administration*, 16 F.3d 1157, 1161 (11th Cir. 1994), the court vacated a rulemaking where OSHA grouped color formulators industry together with other users of cadmium pigments, "and its failure to study any particular dry color formulators whatsoever show that OSHA proceeded generically rather than making the requisite specific findings for this identifiable industry segment." And, in *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1266 (D.C.Cir. 1980), *cert. denied sub nom Lead Industries Assn. v. Donovan*, 453 U.S. 913, 101 S. Ct. 3148, 69 L.Ed.2d 997, 1293-94, 1297 (1981), the court vacated the lead standard in several industries for failure to "examine individual operations to show that the standard can be met in most of them." 647 F.2d at 1297.

These cases contrast with the Court of Appeal's conclusion that one compliant product within a category at the time of a rulemaking ends the inquiry under the best available retrofit control technology standard. If section 40440(b)(1), as correctly espoused by the Court of Appeal, requires that technology be available before it is mandated by law, then the question remains: available for what? A court cannot end scrutiny of a district's choice of categories without analyzing whether the record supports the claim that the technology is actually available within the entire category of products.

IV. CONCLUSION

The Court of Appeal's opinion is certainly an important decision interpreting a statute that is important to the District and regulated community. While that fact allows for the opinion to be certified for publication, it does not justify review in this Court. NPCA submits that the Petition should be denied.

Dated: November 30, 2009

Respectfully Submitted,

FULBRIGHT & JAWORSKI L.L.P.

By _____
JEFFREY B. MARGULIES
Attorneys for Respondent
National Paint & Coatings Association, Inc.

CERTIFICATE OF COMPLIANCE

I, William L. Troutman, declare as follows:

1. I am an attorney at law, duly licensed to practice before all the courts of the state of California, and am an associate in the law firm of Fulbright & Jaworski L.L.P., attorneys of record for the National Paint & Coatings Association, Inc. I have personal knowledge of the following, and can and do testify thereto.

2. The foregoing ANSWER TO PETITION FOR REVIEW is proportionately spaced, in 13 point Times Roman typeface. The brief contains 4,194 words, according to the word count provided Microsoft Word word-processing software.

I declare under penalty of perjury the foregoing is true and correct. Executed this 30th day of November, 2009 at Los Angeles, California.

WILLIAM L. TROUTMAN

PROOF OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, 41st Floor, Los Angeles, California 90071. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service.

On November 30, 2009, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **ANSWER TO PETITION FOR REVIEW** as follows:

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 30, 2009, at Los Angeles, California.

Isabel Lopez