

BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
MEDIVATION, INC.,) OTA NO. 220410165
)
)
) APPELLANT.
)
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TRANSCRIPT OF PROCEEDINGS

Sacramento, California

Tuesday, October 21, 2025

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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APPEARANCES:

Panel Lead: ALJ JOHN O. JOHNSON

Panel Members: ALJ KENNETH GAST
ALJ JOSH LAMBERT

For the Appellant: ANNIE HUANG
FRANCES SEWELL

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

MATTHEW MILLER
KASEY LEWALLEN

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I N D E X

E X H I B I T S

(Appellant's Exhibits 1-15 were received into evidence at page 7.)

(Department's Exhibits A-E were received into evidence at page 7.)

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Sacramento, California; Tuesday, October 21, 2025

1:05 p.m.

JUDGE JOHNSON: We are now on the record.

This is the Appeal of Medivation, Inc., OTA Case No. 220410165. It is 1:05 p.m. on October 21st, 2025, here in Sacramento, California.

This hearing is being led by myself, Administrative Law Judge John Johnson. My co-panelist today are Administrative Law Judges Kenny Gast and Josh Lambert. They are co-equal decision makers in this appeal.

I'd like to remind today's participants and viewers that the Office of Tax Appeals is not a court but is an independent appeals body. The office is staffed by tax experts and is independent of the State's tax agencies. Our decision on appeal will be based solely on arguments and evidence provided by the parties on appeal, in conjunction with an appropriate application of the law. The panel has read the briefs and examined the submitted exhibits, and we're looking forward to your presentations today.

Let's have the parties introduce themselves, starting with Appellants.

MS. HUANG: Thank you. I'm Annie Huang with

1 Pillsbury Winthrop Shaw Pittman for the Appellant, and
2 sitting next to me is Francis Sewell. She is the tax --
3 the tax -- state tax director for Appellant.

4 JUDGE JOHNSON: Okay. Thank you.

5 And are we close enough to the mic on that one?

6 THE HEARING REPORTER: If you could bring it
7 closer to you, that would be great.

8 MS. HUANG: Okay. Is this better?

9 THE HEARING REPORTER: A little closer or louder.

10 MS. HUANG: How about that? Still not?

11 THE HEARING REPORTER: Perfect.

12 MS. HUANG: Okay.

13 JUDGE JOHNSON: Thank you.

14 And introductions from Respondent Franchise Tax
15 Board.

16 MR. MILLER: Good afternoon. Matthew Miller for
17 the Franchise Tax Board.

18 MR. Lewallen: Casey Lewallen for the Franchise
19 Tax Board.

20 JUDGE JOHNSON: Thank you.

21 The issue on appeal is whether Revenue & Taxation
22 Code section 23036(d)(1) allows Appellant to reduce its
23 alternative minimum tax liability using the research
24 credit provided in Revenue & Taxation Code section 23609.

25 Appellant has provided Exhibits 1 through 15.

1 Respondent has provided Exhibits A through E. No
2 objections to those exhibits. They are hereby admitted as
3 evidence to the record.

4 (Appellant's Exhibits 1-15 were received into
5 evidence by the Administrative Law Judge.)

6 (Department's Exhibits A-E were received into
7 evidence by the Administrative Law Judge.)

8 JUDGE JOHNSON: At this stage, unless there are
9 any questions, we are ready to move forward to the
10 parties' presentations.

11 Ms. Huang, if you are ready, you have one hour to
12 present.

13 MS. HUANG: Thank you.

14

15 PRESENTATION

16 MS. HUANG: Good afternoon, and thank you for
17 your time today.

18 So as Judge Johnson just mentioned, that the
19 issue here is whether Appellant can use its research
20 credit to reduce its alternative minimum tax liability,
21 and the answer is yes. A review of section 23036(d)(1),
22 the legislative history, FTB's own analysis of the AMT
23 back in 1992 and also the Appeal of NASSCO would dictate
24 that result. So as a preliminary matter, I'd like to
25 address the Appeal of NASSCO, since FTB has requested that

1 this panel overturn that decision.

2 First of all, NASSCO was decided 15 years ago,
3 and the ensuing years, the legislature has not done
4 anything to change the law despite FTB's very public
5 dissatisfaction with that decision. So then FTB, and
6 NASSCO as well, petitioned the State Board of Equalization
7 to review that case. And SBE, in its order of published
8 opinion, stated that it was not contrary to law that it
9 review all the legislature history. It, of course, at
10 first considered the statutory language and found that
11 there was ambiguity, reviews the legislative history and
12 found in favor of the taxpayer. What we have here is
13 exactly the same thing.

14 So but going back again to FTB, FTB's position is
15 that the decision was flawed. In fact, the FTB has called
16 the decision nonsensical, and I find that very -- that
17 position very astounding. The SBE before this -- the OTA
18 was established, was tasked with reviewing cases from the
19 FTB for decades. And the FTB is saying it doesn't matter.
20 Only their interpretation is correct. And again, this is
21 not the only case that FTB has involving this issue. You
22 have decades and decades of experience from tax
23 practitioners in this -- in California State Tax Law also
24 disagreeing with FTB's on its interpretation of 23036.
25 However, the FTB still insists that its interpretation is

1 the only correct one.

2 So FTB is unhappy with NASSCO, but that is no
3 reason to overturn a 15-year old precedential decision.
4 Courts have, of course, overturned prior decisions, but do
5 it very, very rarely. The -- the party seeking to
6 overturn the decision, in this case the FTB, has
7 substantial burden to prove that the decision was wrong.
8 And like I just said, the FTB tried that once already in
9 its petition for rehearing 15 years ago and was soundly
10 rejected. And now the FTB is trying again for a third
11 bite of the apple at this exact same issue, exact same
12 arguments. The arguments were no different than before.

13 And so the FTB's position is simply overturn
14 NASSCO. Let's start over again is essentially what
15 they're arguing. For the purposes of FTB's position where
16 they say ambiguity is not there, we disagree. And I would
17 like to turn to -- this is the one area where the FTB,
18 despite the fact that we have provided the information in
19 our briefs, the FTB has never addressed it. So back in
20 1987 when AMT was enacted by the California legislature,
21 part of the requirement was for the FTB to prepare a study
22 on AMT and to present it to the legislature. So in 1992,
23 the FTB did so.

24 After five years of studying the AMT, they did a
25 report -- a study that talks about AMT and the various

1 things that they -- that, you know, that involved -- that
2 is involved in AMT calculations, the history of it, the
3 policy behind it, and how it's calculated. And if you
4 look at Appellant's Exhibit No. 6, if I can turn the panel
5 to that exhibit. Looking at page 7, the FTB here talks
6 about the steps of how to calculate the AMT. And if I may
7 reaffirm it so that it is clear with FTB's arguing here
8 versus what it said back then is that finally -- this is
9 Step 4 in the middle of the page. Finally, the effect on
10 tax credits must be calculated with several exceptions.
11 Taxpayers with an AMT liability may not claim any tax
12 credits.

13 Thus, for these taxpayers, their total AMT effect
14 is the sum of their direct AMT liability and their loss of
15 tax credits. Then to foot -- you know, references us to
16 footnote No. 3. Footnote No. 3 says the credits for which
17 this restriction does not apply in California includes
18 solar energy credit, the renter's credit, the research
19 expense credits, the credit for clinical testing expenses,
20 and so on and so forth. And if we turn to Exhibit No. 7,
21 this is a list of all the credits in existence in 1992.
22 And as you can see in FTB's footnote 3 in Exhibit 6, those
23 are the credits that are shown in Exhibit 7, which are the
24 credits under 23036(d) (1) back in 1992.

25 So when you look at what the FTB did back in

1 1992, it clearly agrees with the NASSCO decision.
2 However, the FTB in is -- in one of its briefs claims that
3 this is a preliminary report and therefore, dismissed it
4 out of hand. There's -- they have absolutely shown
5 nothing to say this was changed. They have never tried to
6 explain why their position more than 30 years ago is
7 different from their position now. And on top of that,
8 going back to NASSCO, is that how can the SBE decision in
9 NASSCO be flawed or nonsensical when it simply agrees with
10 what they said back in 1992.

11 So for all the reasons I just stated, the
12 NASSCO's decision should stand, you know. The -- the FTB
13 agreed with it in 1992, like I said. The legislature has
14 amended 23036 (d) (1) several times since NASSCO, and has
15 never changed the law. And SBE itself is a separate state
16 tax agency, and it disagrees with the FTB. So at the very
17 least, you have ambiguity there, right. Even if you don't
18 agree with that SBE's interpretation, you got to agree
19 that there's ambiguity. It cannot be that the FTB's
20 interpretation is the only one that is permitted under the
21 law.

22 Because for -- if two -- in order to get
23 ambiguity, you just need to have more than one reasonable
24 interpretation. I would say that's a -- that's met here.
25 Certainly, there's a reasonable interpretation by the SBE,

1 by the various tax practitioners with decades of
2 experience. How is it that the FTB is the only one that
3 is correct?

4 Therefore -- so moving on with NASSCO being a
5 precedential decision and determining that there is
6 ambiguity, and that the credits under 23036(d)(1) should
7 be allowed to reduce the AMT liability. Understand that
8 NASSCO was specifically focused on the MIC and the easy
9 hiring credits, but the reasoning in NASSCO equally
10 applies here. But just looking at what we have here in
11 terms of ambiguity, I would like to address that as well,
12 even though we believe NASSCO already addressed it, and
13 it's still good law; is if you look at 23036(d)(1), right,
14 the FTB's argues that there's only one way to read
15 23036(d)(1), which means tax, in quotes, "include" --
16 "does not include AMT."

17 The FTB likes to reference subdivision (a). And
18 subdivision (a) talks about, as we read it, the term tax
19 includes any of the following. It doesn't say, "only
20 includes." It doesn't say, "means." It doesn't say,
21 "define as." Includes. Include means it can include all
22 sorts of things other than what's listed. That's the
23 definition of includes. There is -- it's not limiting.
24 It's not exhaustive. It means includes. So you have
25 under B, it then talks about the AMT. And then you have

1 D, subdivision (d). That just says tax in quotes without
2 any definition.

3 The FTB like to define that as regular tax.
4 However, regular tax is defined in 23455(c). It's -- I
5 don't see that 23036(d) (a), or (a), right. So what you
6 have here is you have (d) that says a credit may not
7 reduce tax but the alternative minimum tax as defined by
8 paragraph 1 of subdivision (a) of Section 23455. So the
9 legislature clearly knows how to reference another code
10 section, which it did here in defining alternative minimum
11 tax, but doesn't do that to define the word tax.

12 So what you -- you know, despite FTB's efforts to
13 simply limit the word tax to regular tax, nothing in the
14 statute allows that. It doesn't include -- it doesn't
15 say -- it doesn't exclude the AMT. It doesn't -- it
16 doesn't have anything that would say AMT should not be
17 included in that word.

18 JUDGE JOHNSON: And can I ask you please just
19 once again, come a little bit closer to the microphone.

20 MS. HUANG: Oh, sorry.

21 JUDGE JOHNSON: Okay. I think you're pretty good
22 right there.

23 MS. HUANG: Okay.

24 JUDGE JOHNSON: Yeah.

25 MS. HUANG: So what we have now is -- is the word

1 tax is ambiguous as the SBE decided -- determined in
2 NASSCO. It is curious and telling that the FTB has fought
3 every step of the way to review the legislative history
4 because they keep insisting that it is not ambiguous.
5 However, the law does not prevent looking at the
6 legislature history when the legislature history helps
7 look at the legislative intent. As Lungren versus
8 Deukmejian said, plain meaning rule does not prohibit a
9 court from determining the literal meaning of a statute
10 comports with its purpose.

11 The intent prevails over the letter, and the
12 letter will, if possible, be so read as to conform to the
13 spirit of the act. And in doing so, we should look at the
14 legislative intent. What is the spirit of the act?
15 Generally speaking as -- as -- as the issue here is, all
16 these credits. And it's throughout the legislative
17 history these credits are meant to help taxpayer -- to
18 encourage certain behavior from taxpayers. They are
19 overriding importance to the legislature when they enacted
20 these credits. And for that reason, they wanted to make
21 sure taxpayers could get full benefit of these credits.

22 And if you look at the -- the leg. history, they
23 all say that, you know. They say it's very clear that
24 these credits are meant to reduce AMT. And if -- if I may
25 take the panel through some of these exhibits, I could

1 start with Exhibit 2 of Appellant's exhibits. If we look
2 at page 1 under -- it says No. 5 here, various policy
3 clean up. By the way, this is -- I should also say, this
4 is a 1989. AB 802 is a statute that added the research
5 credit to 23036(d)(1). So what you have here -- so
6 this -- what -- over here and Klehs -- Mr. Klehs was the
7 author of the bill.

8 So we -- in Exhibit 2, on page 1, it says various
9 policy clean up. Bullet point No. 1, R&D slash orphan
10 drug credit against AMT. In the same document, if you --
11 Exhibit 2, page 2, it says current state law allows credit
12 for certain research and development expenses similar to
13 that allowing federal law. Current law also allows a
14 credit for research and orphan drugs. Neither credit may
15 be used to reduce alternative minimum tax. The AMT may
16 only be reduced by the solar and the low-income housing
17 credits. That's how it explains current law. But with
18 this new bill, the proposal was to allow the R&D and
19 orphan drug credits to be taken against the AMT. And then
20 it talks about some set date of the credits.

21 And if I could turn you to Exhibit 3, page 1,
22 this is Mr. Klehs' writing to the governor urging him to
23 sign the bill is the last paragraph on the page, page 1,
24 it was necessary to place two nonconforming items in this
25 bill in order to make this revenue neutral. The first

1 provision allows research and development credit to be
2 fully claimed by companies which are subject to the
3 alternative minimum tax. The second removes some
4 significant administrative obstacles from the employee
5 childcare credit, which you signed into law last year.
6 These corrections are crucial for making these credits
7 work properly.

8 And then if we turn to Exhibit 4, on page 1, this
9 is -- this relates to AB 57. However, I know this is the
10 order of the exhibits, but because of the briefs there are
11 other exhibits. If I could jump ahead to Exhibit No. 9,
12 that also talks about 802 -- AB 802, the research. The
13 one that I put in, that research credit. So it says here,
14 non -- this is page 2, sort of towards the bottom,
15 non-conforming -- non-federal conformity items were
16 significant fiscal impact. Tax credits allow to reduce
17 the tentative minimum tax, allow the credits for research
18 expenditures and clinical testing of orphan drugs reduce
19 the regular tax bill of tentative minimum tax.

20 And then you have No. 10, Exhibit 10. This then
21 goes now we're going back to 57 -- AB 57. And if I could
22 explain why we're also talking about AB 57. AB 57 was the
23 bill that was discussed in NASSCO. So the State Board of
24 Equalization did look at these -- the legislative history
25 for AB 57 quite in detail. And we are including this here

1 because it does reference the research credit, since AB 57
2 was put in after AB 802.

3 So if I could, we can continue on with
4 Exhibit 10, on page 1. It says here, the alternative
5 minimum tax is imposed to ensure that taxpayers who
6 receive a large amount of tax benefit pay some minimum
7 tax. Generally tax credits cannot be used if the
8 resulting net tax liability is below the AMT. There are
9 some credits, however, such as the low-income housing
10 credit, the renter's credit, and the R&D credits, which
11 may be used even if their use would have been such a
12 result. Not permitting the application of the tax credits
13 under such circumstances limits the impact of the credit.

14 And then further down, the second paragraph --
15 because as a reminder, this is talking about the -- the --
16 AB 57 is about the easy credits. So currently, if the
17 business is subject to the AMT, the business can get no
18 benefit from the credit. This bill would permit the
19 business to apply the credits and reduce the liability
20 below their AMT permitting some additional use of the
21 credit.

22 Going onto Exhibit 11, on page 1, existing laws
23 also generally conform with the federal alternative
24 minimum tax which, in effect, prevents taxpayers from
25 using various credits, deductions, exemptions, and other

1 special tax benefits to reduce their tax to zero. Tax
2 credits are generally not permitted to be taken in
3 computing the AMT. However, there are certain exceptions
4 which may be used in computing the AMT: Low-income
5 housing credit, renter's credit, solar credit, research
6 and development credits, orphan drug credit.

7 In the next page, we can see that the -- third
8 paragraph right above the physical effects section. It
9 says this bill is intended to make the full benefits
10 promised under the enterprise zone program area in the Los
11 Angeles Revitalization Zone Concepts available whether the
12 taxpayer is subject to regular tax or alternative minimum
13 tax. So it is very clear here that despite what the FTB
14 is arguing, the AMT is allowed here where the FTB is
15 saying no, that the taxpayer cannot use their research
16 credit to reduce their AMT. We can see in all the
17 documents here that I just read that it states that you
18 can. Taxpayers can use their tax credits to reduce their
19 AMT.

20 But if I can turn -- turn the panel back to
21 Exhibit 4, where it's on page 1, just like what I read in
22 the last few documents, it does talk about that credits
23 are generally not permitted to be taken in computing the
24 AMT. However, there are certain exceptions that may be
25 used in computing the AMT.

1 THE HEARING REPORTER: Ma'am. Ma'am, if you
2 could just slow down a little bit when you are reading.

3 MS. HUANG: Okay. Sorry.

4 THE HEARING REPORTER: Thank you.

5 MS. HUANG: So it includes the low-income housing
6 credit, renter's credit, solar credit, research and
7 development credit, and orphan drug credit. But the next
8 page tells you why the legislature decides that these
9 credits can be used to reduce AMT. On page 2, Exhibit 4,
10 the alternative minimum tax was enacted at the federal
11 level and conformed to by California with objective of
12 preventing a taxpayer, whether individual, partnership, or
13 corporation, to use various combinations of tax benefits
14 to reduce tax to zero.

15 However, some of those tax benefits have been
16 determined by the legislature to be of such overriding
17 importance that exceptions were made to compute an AMT, in
18 effect, authorize use of the credit against, either the
19 regular tax or the AMT. Overriding importance is why
20 these credits were allowed to do so. If we look at what
21 the legislative history shows, it is undisputed that the
22 research credit was meant -- the legislature, I should
23 say, meant for the taxpayers to use the research credit to
24 reduce its AMT liability because that's the only way that
25 the full benefit of the credit could be achieved.

1 Now, the FTB, like I stated earlier, throughout
2 the briefs have resisted talking about legislative history
3 just like they did in NASSCO. But 14 days ago they did
4 provide, as you know, to Judge Johnson earlier, they did
5 provide Exhibits D and E. And Exhibit D is 137 pages. So
6 if I could turn to some of the things that the FTB
7 provided as part of their Exhibit D, instead of supporting
8 their position, Exhibit D supports taxpayer's position.
9 Some of these documents were also, you know, the same
10 documents that I just read as part of Appellant's
11 exhibits.

12 But if I may go through some of the exhibits that
13 the FTB provided and highlight it, you can see that they
14 do not support the FTB's position but, in fact, supports
15 Appellant's position. So if I can turn to page -- if I
16 could ask the panel to turn to Exhibit D, page 5 of
17 Exhibit D where it's highlighted by the FTB in that blog.
18 In the middle of the blog it says, in other words, even if
19 the taxpayer is subject to alternative minimum tax, the
20 R&D credit and the orphan drug credits would partially
21 apply. This is in contrast to the federal practice under
22 which these credits are inapplicable if the taxpayer is
23 subject to alternative minimum tax.

24 And if I can turn to page 20 of Exhibit D, again,
25 it basically repeats what I've been reading the last

1 10 minutes, 15 minutes. It states that AB 802 adds the
2 research and development credit and the orphan drug credit
3 to the list of those which are allowed to reduce the
4 regular tax below the tentative minimum tax. In other
5 words, even if taxpayer is subject to alternative minimum
6 tax, the R&D credit and the orphan drug credits would
7 partially apply. This is in contrast to the federal
8 practice under which these credits are inapplicable if the
9 taxpayer is subject to alternative minimum tax. The same
10 language could be found on page 28 of Exhibit D because it
11 is essentially the same language. I won't read it, but
12 if -- I would just like to point it out to the panel.

13 Then I would like to turn to Exhibit D, page 37,
14 under -- also the highlighted portion. Six says allows
15 research credit and orphan drug credits to offset the
16 alternative minimum tax. And what's interesting in this
17 document is that this is -- this particular document is
18 about AB 802, and it's a bill analysis. It's a -- for,
19 you know, concurrence and senate amendments. So with
20 this, if you look at page 40 of Exhibit D, this attachment
21 is, you know, is -- is the estimates for various
22 provisions in the bill. And under here you could see,
23 under Other Provisions towards the bottom, it says tax
24 credits AMT. So it is included in the revenue estimates
25 as something that you can -- the tax rates as being

1 available to be used against AMT.

2 Now, if we turn to Exhibit D, page 41, this is
3 about the Los Angeles Revitalization Zone, the LARZ. And
4 for this, on page 41, it does also say this bill permits
5 business operating enterprise zones and the Los Angeles
6 Revitalization Zone to reduce their tax liability below
7 their tentative alternative minimum tax by applying
8 credits authorized to businesses operating in the zones.

9 If you go to the next page, it says the tax
10 credits are generally not permitted to be taken in
11 computing the AMT. However, there are certain exceptions
12 which may be used in computing the AMT, and one of them is
13 research and development credits. And further down --
14 again, same page -- right underneath the blocked
15 highlighted section by the FTB, it says this bill is
16 intended to make the full benefits promised under the
17 enterprise zone program area enterprise zone program
18 area -- enterprise zone program area and Los Angeles
19 Revitalization Zone Concepts available, whether the
20 taxpayer is subject to regular tax or alternative minimum
21 tax.

22 So there are several other ones. Instead of
23 taking the entire hour to read the rest of these, which
24 I'm sure panel has already seen them, I would just like to
25 take a little more time to read some of them. So part of

1 this is the FTB has also included several documents in
2 here that talks about the credit ordering rules, which we
3 think -- we believe are irrelevant to this discussion. I
4 want to point out that these are on pages 93, I believe --
5 oh, pardon me -- from 77 to 92. They are -- they have to
6 do with the credit ordering rules, which are irrelevant to
7 the issue of whether taxpayers can use their research
8 credit against AMT under 23036(d) (1).

9 If I could turn to page 55 of Exhibit D, I want
10 to point out again, where the legislature has talked about
11 the regular tax as well as the AMT. So Exhibit D, page 55
12 this is for the -- the MIC. It says here, -- the second
13 paragraph in that box -- that red box, the credit may be
14 used to reduce regular tax liability or alternative
15 minimum tax liability. So all these leg. history talks
16 about -- either talks about only about the AMT, or it
17 talks about regular tax or the AMT. So Exhibit D, page 61
18 talks about LARZ. Again, it could be used against AMT.
19 That's just the language here.

20 And I would also like to point out something
21 when -- in -- in terms of whether the bill really meant
22 what it said, you know, in the leg. history. This --
23 again, this -- this one is about -- this one is for the --
24 for the MIC, I believe. Oh, no, this is for the -- for
25 the LARZ. So what we have on page 63 of D, all the

1 highlighted boxes talk about the LARZ -- the LARZ to be
2 claimed against AMT. But what is interesting here to me
3 is, at the very bottom it talks about arguments and
4 opposition. It says here, California Tax Reform
5 Association states the alternative minimum tax exists to
6 limit the ability of highly profitable companies to
7 utilize so many credits and exemptions that they pay no
8 tax. CTRA does not believe that enterprise zone benefits
9 should be so extensive that profitable companies are
10 essentially tax free.

11 So even the people in opposition understand,
12 right. Back -- back -- this was what? In the early 90s,
13 that they understood back then that this is what the bill
14 did, that you could use the credits to offset your AMT
15 where you essentially pay zero tax. This is contrary to
16 what the FTB's position is, which is that if -- as -- as
17 the NASSCO decision stated as an example, is that FTB's
18 position is that if you have a taxpayer or the regular tax
19 is above their TMT, which are two separate and parallel
20 calculations, that taxpayer one, with that situation,
21 could use the tax credits under (d)(1) -- subdivision
22 (d)(1) to reduce it to zero. But if it flipped where the
23 TMT is higher than the regular tax, then you cannot do so.

24 But with all that we just read here, even in
25 the -- in the leg. history provided by the FTB, there's an

1 overriding importance to these credits, that legislature
2 wanted to make sure that taxpayers can get the full
3 benefits of these credits, that these credits needed to be
4 allowed to be used to reduce the AMT for them to work
5 properly as Mr. Klehs said to Governor Deukmejian back in
6 1989.

7 And then so the FTB then continues on. It talks
8 about the film credit. And then also the GO-Biz credit.
9 And in here, the GO-Biz -- this one is Exhibit D,
10 page 125.

11 Pardon me. I've got to hold this a little bit
12 further away from me.

13 So it says here, the authors have proposed
14 several amendments to the bill. This is for the film
15 credit, by the way. Among others, one, conform to
16 existing law by allowing the credit to be used to reduce a
17 recipient's tax below the alternative minimum tax and
18 therefore, fully monetize the credit. And then the next
19 one that the FTB has, or the last one in term of the
20 credits here is the GO-Biz credit.

21 So this is Exhibit D, page 126. In, again, the
22 highlighted section it says here, the second paragraph,
23 usually state law does not allow taxpayers to use tax
24 credits to reduce its tax liability under the tentative
25 minimum tax. A part --

1 JUDGE JOHNSON: I think you could slow down a
2 little bit more while you're reading, please.

3 MS. HUANG: Oh, sorry.

4 State tax law does not allow taxpayers to use tax
5 credits to reduce its tax liability under the tentative
6 minimum tax. A part of the alternative minimum tax
7 intended to ensure that corporations that receive
8 significant tax liability pay some share of the cost of
9 public services. Without AMT, corporations with
10 significant tax credits can avoid taxes all together when
11 the value of the credits it applies exceeds its net income
12 in a taxable year. And further down it says here,
13 generally taxpayers cannot use tax credits to reduce TMT.
14 However, the legislature has allowed some credits to do
15 so, such as research and development tax credits. While
16 he talks about TMT -- and that is the other issue, if I
17 could use this time. And I apologize for jumping around
18 here.

19 The TMT and the AMT in one of the responses to
20 the OTA Foundations Division's questions about how the TMT
21 and AMT work. And as NASSCO has explained, as FTB itself
22 has explained in its 1992 study on the AMT, as, you know,
23 the FTB has explained this case, as we have explained. So
24 I think it's generally understood that you have two
25 separate calculations. One for regular tax, and one for

1 the TMT. And if it's above the rate -- the TMT amount is
2 above the regular tax amount, that difference is the AMT.
3 So the TMT includes the AMT amount. So it is impossible
4 to separate those two.

5 So the FTB, like I said, submitted 137 pages of
6 exhibits where they, instead of supporting FTB's position,
7 actually supports Appellant's position. But in addition
8 to -- to that, as FTB has conceded in its last brief and
9 response to OTA's questions, there are several other
10 amendments where the legislature added other credits to
11 23036 (d) (1). And if I may turn you to those -- turn to
12 those exhibits, we can go through those as well.

13 So, GO-Biz was, like I said, Exhibit D stops with
14 GO-Biz in terms of leg. history. However, after GO-Biz,
15 we have the college access tax, the advanced strategic
16 aircraft credit, and another couple California motion
17 picture and television production credits. The -- the FTB
18 does not talk about them, and Appellant provided leg.
19 history for those credits as well. So if we can turn to
20 Appellant's Exhibits 13 through 15, I will start with 13.
21 Let me turn to it.

22 So page 4 of Exhibit 13, amendments add a new
23 college access tax credit for one tax year, tax year 2017,
24 under the insurance gross premiums tax and corporation
25 tax. It adds the college access tax credit to a list of

1 tax credits that can reduce the tentative minimum tax
2 under the alternative minimum tax calculations for
3 personal income and corporation tax.

4 And then if we turn to Exhibit 14, this is about
5 the advanced strategic aircraft credit. It says here
6 under this page 14 -- I mean, page 4 of Exhibit 14 -- 7,
7 it says advanced strategic aircraft credit specifies that
8 for taxable years beginning on/or after January 1, 2020,
9 and before January 1, 2026, the advanced strategic
10 aircraft credit could be used to reduce alternative
11 minimum tax.

12 And the -- lastly, we have Exhibit 15, page 4.
13 This is where the advance strategic aircraft credit was
14 extended because it was extended 23036(d)(1) was also
15 amended to extend the use of this credit against the AMT.
16 And this was the floor report for the 2024 to 2025 budget,
17 and this was prepared in June of 2024. So as recently as
18 16 months ago, the legislature said in this floor report;
19 it says the trailer bill language to extend the timeline
20 for when the advanced strategic aircraft credit could be
21 used to reduce alternative minimum tax before
22 January 1, 2026, to before January 1, 2031. Like I said,
23 the dates just coincides with the extended credit.

24 So, all these years, starting in 1989 when the
25 research credit was put in until June of 2024, with the

1 last addition to section 23036(d)(1), the legislature has
2 been very clear that these credits under (d)(1) are
3 allowed to be used to reduce a taxpayer's AMT liability.
4 The FTB has provided no arguments and no leg. history to
5 counter that. All it has -- FTB has said throughout, has
6 insisted both in NASSCO and here again, is that you don't
7 need to look at the leg. history. You don't need to look
8 at it because it's -- the language, the statutory language
9 is not ambiguous. This overwhelming list of leg. history
10 and support of the taxpayer's position, Appellant's
11 position, and against FTB's position, the FTB would just
12 like the panel to ignore.

13 But to sum it up, it cannot be ignored because,
14 you know, FTB's initial position that it's am -- it's not
15 ambiguous is incorrect. NASSCO -- the decision in NASSCO
16 went through it in detail, but as -- as we noted,
17 23036 (d)(1) -- I mean, 23036(a) does not exclude the AMT.
18 23036(d)(1) does not define the word tax as regular tax.
19 The legislature certainly knows how to reference another
20 statute for a clear definition as it did for the tentative
21 minimum tax for 23036(d)(1), but it did not do so for the
22 term tax.

23 So in summary, we would like to say that first,
24 the NASSCO decision should stand as it is good law. The
25 legislature knew of the decision, certainly did not change

1 it. And the FTB has provided no reason, other than it
2 disagrees with it for -- for -- to overturn a decision
3 that's been around for 15 years. And not only that, the
4 NASSCO decision agrees with FTB's own position back in
5 1992. And -- and the leg. history supports taxpayer's
6 position that it can use its research credit to reduce its
7 AMT liability.

8 So for this reason -- for all the above reasons,
9 we ask that this panel sustain and the taxpayer's position
10 and reject the FTB's position on this issue.

11 Thank you.

12 JUDGE JOHNSON: Thank you.

13 Let me turn for panel questions, starting with
14 Judge Gast.

15 JUDGE GAST: Yeah. I have one question. If the
16 panel finds that the term "tax" in (d)(1) -- is that too
17 loud?

18 If the panel finds the term "tax" in (d)(1) is
19 unambiguous, so contrary to NASSCO, do you have a position
20 as to why you should still win?

21 MS. HUANG: If I may, Judge Gast, if I could
22 rephrase to make sure I understand you, is that you're
23 saying that if -- if this panel decides that NASSCO was
24 wrongly decided and that it should -- that there's only
25 one way to read 23036, is whether the taxpayer should

1 still win? I would say that the taxpayer would still win
2 because it is just -- I -- I hate to put it this way, but
3 it's hard to imagine why it would only be interpreted one
4 way because the statute is not clear.

5 You know, it talks about -- it does. If I may --
6 sorry -- if I may just reference the statute itself. I
7 know the FTB -- that is the FTB's position, and it has
8 been, you know, for the last 15 years since NASSCO.
9 And -- and I do understand your question, Judge Gast, and
10 I -- I -- you know, I'm not trying to ignore it. But I
11 just want to explain that -- but -- it is that you have
12 (a) (1) that says the term tax includes any of the
13 following, right, includes. It doesn't say only includes.
14 It doesn't say means or define. It doesn't have that
15 limiting language, you know. If I say, you know, this
16 table in -- you know, on this table I have things that
17 includes my glasses, my -- my water bottle. That doesn't
18 mean those are the only two things here, you know. It's
19 the definition of the word includes.

20 And -- and then you have (b), right. It does
21 define -- it also says includes also. And then AMT is
22 referenced there. Then you have (d) (1) where the term tax
23 is not defined. But like I said earlier, the tentative
24 minimum tax is defined by a reference through a separate
25 statute. So the legislature knew what it was doing. And

1 I'd like to say also, if I may, turn you to section
2 23036(i). Okay. So you have (i) (2) where here the
3 statute talks about regular tax. But in doing so it
4 references. It says regular tax as defined in section
5 23455 -- regular tax as defined in section 23455. You
6 don't have that in (d) (1). It doesn't reference 23455.
7 It doesn't say regular tax. It has none of that.

8 So FTB is trying to insert a word in there, a
9 term in there that is not contemplated by the statute.
10 And again, referencing the leg. history, it supports that
11 position. You know, supports a position that it is met
12 because of the overriding importance of these credits that
13 are meant to encourage economic activity in the state.
14 These credits, economic activities that the legislature
15 felt was very important, like, vital to the economy of the
16 state, that they want to make sure that taxpayers could
17 take full benefits that -- full monetization of these
18 credits. And the only way to accomplish that is through
19 the ability to use the tax credits against AMT.

20 Otherwise, just as an example given earlier, if
21 your regular tax is above your TMT you're good to go. You
22 can use the credits to reduce it all the way down to zero.
23 But if you just happen to have where your TMT is higher
24 than your regular tax, then you're out of luck. How is it
25 possible that the legislature would treat two different --

1 two taxpayers so differently when the underlying tax is
2 meant to encourage the same activity in the state with the
3 underlying tax has the overriding importance to the tax.
4 It makes no sense that that would be what is meant by the
5 legislature.

6 JUDGE GAST: Thank you. Just a quick follow up
7 there. So when I look at (d)(1) it says a credit may not
8 reduce the tax below the TMT. In the situation where
9 you're saying the R&D credit can reduce the AMT, the AMT
10 would have to equal the TMT. That's the only situation
11 that this statute would make sense, I guess, (d)(1).

12 MS. HUANG: Well, you can have -- you have -- you
13 would have the TMT, you know, in situations here like
14 in -- for Appellant, right. They were able to use -- they
15 used their research credit to reduce their AMT. And so
16 they used it all to bring it down to zero. So to answer
17 your question, whether if that's the only situation, I
18 guess if you -- another situation if you look at it,
19 right, is whether you have -- when you have the TMT over
20 regular tax, and the TMT, let's say, is -- is, you know,
21 \$500,000, and the regular tax \$300,000, right. So the --
22 the AMT is \$200,000. And so if -- if -- in that case, you
23 have -- you should be able to use the credits to bring it
24 all the way down.

25 JUDGE GAST: Okay. Yeah. I was just -- it seems

1 like that would -- the only situation would be the AMT
2 equals the full value of the TMT. Otherwise, it wouldn't
3 be below. It would be less than the TMT because that
4 would equal AMT plus regular tax. But --

5 MS. HUANG: If I may, I'm sorry to interrupt. I
6 think maybe another way to look at it so -- is when you
7 have the regular tax about -- above the TMT, right. So in
8 that situation FTB agrees you can use the credit to bring
9 it all the way down to zero. So the regular tax is above
10 the TMT, and you can bring it all the way down to zero.

11 So I guess your question is, if you -- the other
12 way around where the TMT is higher than the AMT. So
13 you -- the tax, which includes the AMT, you cannot bring
14 it down, right. But then once you get to the -- when
15 you -- when you -- it would still apply because if it's
16 below the regular tax, right, it would include. You could
17 bring it all the way down. Because again I would compare
18 two taxpayers. You have two equal taxpayers with the same
19 economic activities that basically allow you to claim this
20 credit, right. So you have one where you can bring it all
21 the way down to zero. And then the second taxpayer would
22 somehow be limited unless it's a specified situation that
23 just happens to work a certain way.

24 That would seem to argue for -- that would seem
25 to support disparate treatment for -- for the same kind of

1 credit. And so in terms of -- of --of how the credits
2 would work, the regular tax above the TMT will bring it
3 down to zero; the regular -- the TMT above the AMT in that
4 case.

5 JUDGE JOHNSON: All right. The TMT above the
6 regular tax.

7 MS. HUANG: Right. You have the regular tax and
8 you have the AMT, then you can bring it down below. And
9 your question is because of the language about the below
10 the TMT is -- is that, you know, then it wouldn't go below
11 the regular tax. Is that the question you're asking?

12 JUDGE GAST: Yeah. I was just -- why does tax in
13 (d)(1) mean AMT when the only situation you can reduce tax
14 below the TMT is if the AMT equals the full value of the
15 TMT. But --

16 MS. HUANG: But then I would say then, once you
17 get you under TM -- when you get to regular tax, then as
18 some of the language I have read, it says it can be used
19 against regular tax for the TMT -- the AMT. So for that,
20 you should -- you know, and there should be no difference.
21 I don't know if that answers your question.

22 JUDGE GAST: That's okay. We can come back to it
23 later.

24 MS. HUANG: Okay.

25 JUDGE GAST: Thank you.

1 JUDGE JOHNSON: Thank you.

2 And Judge Lambert.

3 JUDGE LAMBERT: I don't have any questions.

4 Thanks.

5 JUDGE JOHNSON: Thank you.

6 At this time, we will take a ten-minute break,
7 unless anyone needs longer, and we'll come back here at
8 2:00 o'clock.

9 We are off the record.

10 (There is a pause in the proceedings.)

11 JUDGE JOHNSON: If we're ready we can go back on
12 the record. Thank you.

13 Okay. Now, Respondent will have one hour for
14 their presentation if they are ready. And just please try
15 to stay close the to the microphone.

16 MR. MILLER: Thank you.

17

18 PRESENTATION

19 MR. MILLER: Good afternoon, Judge Johnson,
20 Judge Gast, and Judge Lambert.

21 The principal issue in this appeal is whether
22 Appellant Medivation Incorporated may reduce its
23 alternative minimum tax liability by utilizing the
24 California research credit under Revenue & Taxation Code
25 section 23609. Here and after, we will refer to the

1 alternative minimum tax by the acronym AMT.

2 In 1986, Congress enacted the 1986 Tax Reform
3 Act, which introduced federal AMT provisions. In its
4 analysis of the bill, the Senate finance committee noted
5 that it was important, quote, "That no taxpayer with
6 substantial economic income avoid a significant tax
7 liability by using exclusions, deductions, and credits.
8 Although these provisions may provide incentives for
9 worthy goals, they become counterproductive when taxpayers
10 are allowed to use them to avoid virtually all tax
11 liability. The ability of high-income individuals and
12 highly profitable corporations to pay little or no tax
13 undermines respect for the entire tax system and thus, for
14 the incentive provisions themselves. Additionally, even
15 aside from public perceptions, it is inherently unfair for
16 high-income individuals and highly profitable corporations
17 to pay little or no tax due to their ability to utilize
18 various tax preferences," end quote.

19 In 1988, California's AMT took effect to closely
20 mirror its federal counterpart. Since then, all
21 corporations doing business in California have been
22 subject to California AMT provisions. Here, Appellant
23 seeks to use its California research credit to circumvent
24 the AMT provisions and avoid all income tax liability for
25 taxable year 2015, despite reporting California net income

1 in excess of \$18 million. This position is contrary to
2 the legislature's intent as codified in the plain language
3 of the applicable statutes.

4 Also, this position undermines respect for the
5 research credit itself and for California's entire tax
6 system. It is inherently unfair for Appellant, a highly
7 profitable corporation, to pay no income tax on
8 \$18 million when other Californians and corporations doing
9 business in California pay their fair share. In support
10 of its position, the Appellant relies on an obvious
11 misreading of subdivision (d) (1) of section 23036,
12 reinforced by an incorrect and unworkable precedential
13 opinion from the Board of Equalization, Appeal of NASSCO
14 Holdings Incorporated. Here and after, we will refer to
15 the Board of Equalization by the acronym BOE.

16 In NASSCO, the BOE misinterpreted the plain
17 language of section 23036, define statutory ambiguity
18 where none exist. In doing so, the BOE created an
19 erroneous rule that is incompatible with the plain
20 language of section 23036 and incompatible with part 11 of
21 Division 2 of the Revenue & Taxation Code, Corporation Tax
22 Law. NASSCO was wrongly decided in 2010, and any decision
23 by the OTA predicated on its flawed reasoning would be
24 wrongly decided today. Notably, Appellant does not rely
25 on Section 23609, the statute that allows for the research

1 credit to which Appellant claims entitlement.

2 Appellant filed five separate briefs in this
3 appeal, and in none of those briefs does Appellant even
4 cite to section 23609, not even in a footnote. Perhaps
5 the reason for this glaring omission is the fact that the
6 plain language of section 23609 provides that the research
7 credit is only allowed against, quote, "Tax as defined by
8 section 23036," end quote. And the definition of tax
9 under 23036 does not include AMT.

10 Appellant also relies on 15 exhibits. Exhibit 1
11 is the relevant Notice of Action. Exhibits 2 through 15
12 represent a combination of carefully selected excerpts
13 from the legislative history of section 23036 and
14 extraneous documents that were never considered by the
15 full legislature and therefore, should be given no weight
16 by the OTA under the applicable case law. Throughout this
17 appeal, Respondent has maintained that the OTA's review of
18 legislature history of section 23036 is inappropriate
19 because the statutory language is unambiguous. However,
20 in the event that the OTA determines that the statutory
21 language is ambiguous, it needs the full legislative
22 record so that it is not misled by Appellant's lack of
23 candor in its omitting the full record.

24 Therefore, Respondent submitted Exhibit D, which
25 includes 137 pages of the legislative history of section

1 23036 from 1989 to present. Exhibit D includes every
2 portion of the legislative history record that relates to
3 the operation of subdivision (d)(1), including portions
4 that Appellant previously submitted and the portions that
5 it selectively excluded from its submissions.

6 This afternoon my co-counsel and I will divide
7 our presentation into five parts. First, I will discuss
8 sections 23036 and 23609, including the mechanics of the
9 statutes and the purpose they serve in the statutory
10 scheme. Second, I will discuss ambiguity, including the
11 legal requirements for a finding of ambiguity and the lack
12 of ambiguity within subdivision (d) of section 23036.
13 Third, I will discuss the flawed reasoning contained in
14 the NASSCO opinion and why it is legally incorrect.
15 Fourth, I will discuss the OTA's authority for removing
16 the precedential status of NASSCO and the imperative for
17 doing so. And fifth, my co-counsel, Mr. Lewallen, will
18 discuss the correct legal analysis for determining the
19 meaning of tax for purposes of subdivision (d)(1), only if
20 the OTA first determines that the term "tax" as used in
21 subdivision (d)(1) is ambiguous, which it should not.

22 In our presentation, Respondent will establish
23 that sections 23036 and 23069 are unambiguous, and they do
24 not permit Appellant to reduce its AMT liability by
25 utilizing the California research credit. We will also

1 explain the rationale and imperative for overturning
2 NASSCO and the OTA's authority for doing so. And lastly,
3 we will establish that even if OTA determines section
4 23036 subdivision (d) (1) to be ambiguous, the Franchise
5 Tax Board's interpretation is the proper interpretation
6 that is consistent with the legislative intent and
7 consistent with the purposes of the AMT that all taxpayers
8 pay their fair share.

9 With that, I will turn to 23036 and 23609. As
10 held by the OTA in the Appeal of Pino, tax credits are a
11 matter of legislative grace, and the taxpayers bear the
12 burden of proving that they are entitled to the tax
13 credits they claim. Statutes granting tax credits are to
14 be construed strictly against the taxpayer with any doubts
15 result in FTB's favor. Section 23036 is contained within
16 Article 2 of Chapter 1 of part 11 of Division 2 of the
17 Revenue & Taxation Code, which enumerates definitions
18 applicable to part 11 of Division 2.

19 The first statute within Article 2 of Chapter 1
20 is Section 23030. It provides, quote, "Except where the
21 context otherwise requires, the definitions given in this
22 chapter govern the construction of this part," end quote.
23 In other words, the definitions in Chapter 1, inclusive of
24 those definitions provided in section 23036, govern the
25 construction of part 11. The statutory construction is

1 consistent with California's longstanding legislative
2 drafting methodology.

3 According to the Legislative Counsel of
4 California in its 1975 publication entitled "Legislative
5 Drafting Manual," when a word is used in a sense, other
6 than its dictionary meaning, the use of a definition at
7 the beginning of the law to which it applies is utilized
8 to avoid repetition of a phrase. The current manual used
9 by the legislature is entitled "Handbook on Legislative
10 Drafting in California," by Chris Micheli, and it contains
11 similar guidance. Additionally, the current manual
12 provides that a defined term should be enclosed by
13 quotation marks to indicate it is a defined term in the
14 code. In other words, it has a meaning other than its
15 dictionary meaning. This legislative practice of
16 enclosing specifically defined terms within quotation
17 marks is consistent with standard legal style guidelines
18 as outlined in "The Elements of Style" by Bryan Garner.

19 Consistent with these authorities, every term
20 defined in Article 2 of Chapter 1 of part 11 is enclosed
21 by quotation marks to designate them as defined terms with
22 specific meanings for purposes of part 11, other than
23 their dictionary meanings. As relevant to this appeal,
24 subdivision (a) (1) of section 23036 defines tax for
25 purposes of part 11. In subdivision (a) (1), the term

1 "tax" is enclosed by quotation marks indicating that it is
2 a subsequent use in the statute and throughout part 11 is
3 understood to carry the meanings assigned by subdivision
4 (a) (1).

5 In part 11, the term "tax" includes four
6 enumerated taxes: The corporation franchise tax, the
7 corporation income tax, the tax on unrelated business
8 taxable income of an exempt organization, and the
9 corporation franchise and income tax is imposed on
10 S corporations. Thus, whenever the term "tax" is used for
11 purposes of part 11, it means one or more of these
12 enumerated taxes.

13 Subdivision (a) (2) provides for a specific
14 modification to the definition of tax for purposes of
15 part 11 in the case of certain installment sales.
16 Specifically, subdivision (e) (1) and (f) (2) of
17 Section 24667 provide that -- provide for the definition
18 of tax under subdivision (a) (1) with specific
19 modifications to apply to certain installment sales.
20 Subdivision (b) clarifies that for purposes of
21 administering specifically identifying provisions
22 contained within Part 10.2 of Division 2 of the Revenue &
23 Taxation Code, entitled "Administration of Franchise and
24 Income Tax Laws," and only for purposes of administering
25 those specifically identified provisions within 10.2 the

1 term "tax" also includes the annual tax on limited
2 partnerships, the annual tax on limited liability
3 companies, the annual tax on limited liability
4 partnerships, the AMT, the tax on built-in gains of S
5 corporations, and the tax on excessive passive investment
6 of S corporations.

7 If the term "tax" as defined in subdivision
8 (a) (1) included any of the taxes enumerated in
9 subdivision (b), including the AMT, there would be no need
10 to include the word "also" in subdivision (b). Thus,
11 subdivisions (a) and (b) serve as definitional
12 subdivisions. Subdivision (a) defines the term tax for
13 purposes of all statutory provisions within part 11, and
14 subdivision (b) defines the term tax for purposes of
15 certain specified statutory provisions within Part 10.2.
16 Subdivisions (d) through (g) of section 23036 pertain to
17 the treatment of credits in part 11. As relevant to this
18 appeal, I will discuss subdivisions (d) and (e).

19 Subdivision (d) (1) provides that a credit may not
20 reduce the tax below the tentative minimum tax, except for
21 the 23 enumerated credits listed in subdivision (d) (1).
22 Subdivision (d) (1) (d) includes the research credit as one
23 of these 23 enumerated credits. Here and after, we will
24 refer to the tentative minimum tax by the acronym TMT.
25 Notably in subdivision (d) (1), the term tax is enclosed

1 again, by quotation marks to indicate the specific meaning
2 of tax under subdivision (a) (1), rather than the general
3 dictionary meaning of tax, which could include a multitude
4 of meanings. Subdivision (e) provides that any credit
5 which is partially or totally denied under subdivision (d)
6 is allowed to be carried forward to reduce the tax in
7 succeeding years if the provisions relating to that credit
8 include a provision to carry forward the unused portion of
9 that credit.

10 Together subdivisions (d) and (e) operate to
11 distinguish between those credits that create additional
12 advantages for a corporate taxpayer, and those credits
13 that do not. Under subdivision (d), if a corporate
14 taxpayer has credits that it can utilize to reduce its
15 regular tax below TMT, it must do so. It pays its regular
16 tax liability plus the amount by which its TMT exceeds its
17 regular tax liability. This difference is the taxpayer's
18 AMT liability. If the taxpayer has an AMT liability, it
19 will also generate the minimum tax credit under
20 Section 23453, which it can carry forward to succeeding
21 taxable years and utilize to reduce its regular tax in one
22 or more of those succeeding years.

23 Therefore, subdivision (d) provides corporate
24 taxpayers with two distinct tax advantages. First, if the
25 corporate taxpayer can utilize its tax credits enumerated

1 in subdivision (d) to reduce its regular tax below TMT, it
2 is more likely to be able to -- to be able to fully
3 monetize its credits before they expire.

4 Second, by reducing its regular tax below TMT,
5 the corporate taxpayer will generate an AMT liability and
6 therefore, will also generate a minimum tax credit that
7 will carry forward to future taxable years.

8 Subdivision (e) provides that those credits that do not
9 generate a minimum tax credit can be carried forward to
10 reduce regular tax in succeeding years, if the provisions
11 relating to those credits include carry forward
12 provisions. However, because the taxpayer cannot utilize
13 those credits to reduce its AMT below its regular --
14 excuse me -- to reduce its regular tax below its TMT, that
15 taxpayer will be less likely to be able to fully monetize
16 its credits, and it will be less likely to generate a
17 minimum tax credit to carry forward to future taxable
18 years.

19 Section 23609 provides, quote, "For each taxable
20 year beginning on/or after January 1st, 1987, there shall
21 be allowed a credit against the tax as defined by section
22 23036, an amount determined in accordance with Section 41
23 of the Internal Revenue Code relating to credit for
24 increasing research activities," end quote. Section 23609
25 is within Chapter 3.5 of part 11. Therefore, pursuant to

1 Section 23030, the definitions contained in Article 2 of
2 Chapter 1 of part 11 apply to Section 23609. This
3 includes the definition of tax under section 23036
4 subdivision (a) (1).

5 For good measure, the legislature specifically
6 identifies the taxes which reduce -- which the research
7 credit is allowed to reduce within the statutory text of
8 23609 itself. It identifies, quote, "Tax as defined by
9 section 23036," end quote. Tax is enclosed with quotation
10 marks indicating that it refers to the term it defined in
11 the code, and specifically identifies the statutory
12 definition within subdivision (a) 1 of section 23036 as
13 subdivision (a) (1) contains the only definition of tax for
14 purposes of part 11. Thus, the plain language of Section
15 23609 provides that the research credit can only be
16 utilized to reduce a corporate taxpayer's corporation
17 franchise tax, corporation income tax, the tax on
18 unrelated business taxable income of an exempt
19 organization, and the corporation franchise and income tax
20 as imposed on S corporations. Section 23609 is a statute
21 granting a tax credit therefore, it must be construed
22 strictly against the taxpayer with any doubts result in
23 FTB's favor.

24 As Appellant hasn't even cited Section 23609 or
25 explained how Section 23609 permits it to utilize its

1 research credit to reduce its AMT despite its plain
2 language indicating that it cannot. Appellant has not met
3 its burden. Therefore, the OTA should hold that pursuant
4 to the plain language of section 23036 subdivision
5 (d) (1) (D) and the plain language of Section 23609,
6 Appellant may not utilize its research credit to reduce
7 its AMT.

8 Next, I will discuss the legal requirements for a
9 finding of statutory ambiguity and the lack of ambiguity
10 within subdivision (d) (1) of Section 23036. In *Mattei*
11 *versus Corporate Management Solutions Incorporated*, the
12 California Court of Appeal notes the following
13 well-settled principle of law. An ambiguity exists in a
14 statute where a party can identify an alternative
15 semantically reasonable meaning of a statute. An
16 ambiguity can be patent arising from the face of the
17 statute, or latent, based on an in -- based on extrinsic
18 evidence. However, a court or tribunal will not strain to
19 create an ambiguity where none exist.

20 Furthermore, in other case *Montette versus San*
21 *Francisco Board of Supervisors*, the Court of Appeal notes
22 an additional well-settled principle of law. That is,
23 extrinsic evidence should not be used to discover
24 ambiguity when statutory language appears to be plain on
25 its face. In other words, the circular use of extrinsic

1 evidence cannot be used to both create and resolve
2 ambiguity in a statute. The plain language of section
3 23036 is unambiguous. For purposes of part 11, the term
4 tax includes those four enumerated taxes. Thus, whenever
5 the term tax is used for purposes of part 11, it means one
6 or more of these four enumerated taxes.

7 Throughout the proceedings in this appeal,
8 Appellant has failed to identify any alternative
9 semantically reasonable meaning of subdivision (d)(1).
10 When pressed to do so, essentially, it has two responses.
11 First and foremost, it argues there is ambiguity because
12 the BOE says so. And second, argues that there is
13 ambiguity because certain carefully selected excerpts of
14 the legislative history of section 23036 create ambiguity.
15 Therefore, the OTA should use these selected excerpts to
16 resolve the ambiguity which these same excerpts created.
17 In other words, the circular use of extrinsic evidence to
18 both create and resolve ambiguity, the use of which was
19 rejected by the Court of Appeal in Monette.

20 So what is Appellant's alternative semantically
21 reasonable meaning of tax for purposes of subdivision (d)?
22 Appellant never answers that question. Here again today,
23 Appellant essentially states because the BOE says so. As
24 another state agency by definition, they are reasonable.
25 Whether the BOE is reasonable as an agency or unreasonable

1 is not the point. The question is whether there is an
2 alternative meaning of the statute that is semantically
3 reasonable, not whether the alternative meaning is made by
4 a reasonable agency. What Appellant refuses to admit is
5 that their unspoken alternative meaning is not only
6 semantically unreasonable, it is nonsensical.

7 As outlined by the Court of Appeal in *People*
8 *versus Johnson*, when construing statutes, courts avoid
9 interpretations and constructions that defy common sense
10 or that might lead to mischief or absurdity, including
11 literal meanings that would lead to a result not intended
12 by the legislature. Yet, this is what Appellant asks the
13 OTA to do. Using Appellant's definition of tax, that is
14 to include AMT, subdivision (d)(1) would read, "A credit
15 may not reduce the AMT below TMT, except for the 23
16 enumerated credits listed. However, the TMT is not a tax.
17 Rather, it is a computation utilized to calculate a
18 taxpayer's AMT. The AMT is the difference between a
19 taxpayer's regular tax and its TMT if regular tax is less
20 than the AMT.

21 In our briefing, Respondent asked the question,
22 how can a credit reduce a computation utilized to
23 calculate a taxpayer's AMT below a taxpayer's AMT? It is
24 an impossible calculation because the TMT is a computation
25 utilized to create -- calculate the AMT. Appellant fails

1 to ever reconcile subdivision (a) (1) with its unspoken
2 definition of tax in subdivision (d) (1). In other words,
3 Appellant also never answers the following question. If
4 subdivision (a) (1) defines the term tax for purposes of
5 part 11, and subdivision (d) (1) is within part 11, why
6 does the definition of tax in subdivision (a) (1) not apply
7 to subdivision (d)?

8 In addition to rendering subdivision (d)
9 nonsensical, interpreting tax for purposes of subdivision
10 (d) to mean anything other than the four taxes identified
11 in subdivision (a) (1), renders subdivision (a) (1)
12 superfluous. Why enact a definitional statute that is
13 inapplicable to the word that it defines? If the -- if
14 the use of tax in subdivision (d) (1) is ambiguous, is
15 every other use of the term tax within part 11 also
16 ambiguous? And if not, why not? Appellant does not
17 explain this.

18 Again here today, Appellant refuses to explain
19 how their unspoken interpretation is semantically
20 reasonable. Appellant's interpretation is exactly the
21 type of interpretation that is to be avoided in according
22 to the California Supreme Court. In *Dyna-Med Incorporated*
23 *versus Fair Employment and Housing Commission*, the Court
24 held that courts must avoid the construction of terms that
25 would, quote, "Generate surplusage elsewhere in a

1 statute," end quote. This opinion reenforces the core
2 principle of the anti-surplusage canon. The legislature
3 is presumed to use each term in a statute meaningfully and
4 purposefully, not redundantly.

5 Here, Appellants ask the OTA to interpret
6 subdivision (d)(1) in such a way as to render the
7 definitions provided in subdivision (a)(1) as mere
8 surplusage. This leads to the BOE's opinion in NASSCO.
9 Prior to the BOE's formal opinion in NASSCO, Respondent
10 maintains that the only credits available to reduce a
11 taxpayer's AMT liability were those credits whose statutes
12 provided for such a reduction of AMT. Despite the plain
13 language of section 23036, in NASSCO, the BOE erroneously
14 determined that patent ambiguity exists in the statute.
15 The BOE states the following, quote, "The statute does not
16 clearly express the meaning of the term tax for purposes
17 of subdivision (d)(1). While Respondent would have us
18 apply the definition as set forth in subdivision (a), that
19 section includes some types of tax and excludes others,
20 but does not specify where AMT falls in this definition,"
21 end quote.

22 The statement ignores the plain language of
23 section 23036 and the purpose it serves in the statutory
24 scheme. As I explained, section 23036 is within Article 2
25 of Chapter 2 of part 11, which enumerates the definitions

1 for part 11. In other words, subdivision (a) defines tax
2 for purposes of administering part 11. Contrary to the
3 BOE's conclusion, section 23036 clearly expresses the
4 meaning of the term tax for purposes of part 11 and for
5 subdivision (d)(1), which is within part 11; and AMT is
6 outside of that definition.

7 Also in NASSCO, the BOE erroneously determined
8 that latent ambiguity exists in the statute. As
9 articulated by the Court of Appeal in Coburn versus
10 Sievert, latent ambiguity exists when the literal
11 application of a statute would frustrate the purpose of a
12 statute or would produce absurd consequences. The BOE
13 compared two taxpayers. One taxpayer whose regular tax is
14 zero with an AMT liability equal to the full value of its
15 TMT, and a second taxpayer with a regular tax equal to or
16 greater than its TMT. If applied as the FTB argued, the
17 first taxpayer would have an AMT imposed that is equal to
18 the full value of its TMT, whereas the second taxpayer
19 would be able to reduce its regular tax to zero if it had
20 available easy hiring credits. The BOE characterized
21 these two different outcomes as, quote, "Essentially
22 penalizing a taxpayer with available easy hiring credits
23 and a lower regular tax," end quote.

24 However, the BOE failed to take the next step in
25 the analysis and recognized that the taxpayer who is not

1 able to reduce its regular tax below TMT with credits in
2 the first taxable year would carry forward those credits
3 to future taxable years. Whereas the first taxpayer would
4 have exhausted those credits in the first taxable year.
5 Also, both the taxpayers would pay amounts equal to their
6 TMT; one with regular tax alone, and one with AMT. Both
7 taxpayers would pay the same amount of tax. Far from
8 absurd, this result is precisely what the legislature
9 intended and is consistent with the ordinary application
10 of the AMT scheme.

11 Further, the BOE failed to identify any
12 alternative semantically reasonable meaning of subdivision
13 (d) (1). Its apparent unspoken alternative meaning is the
14 same as Appellant's. That is, quote, "A credit may not
15 reduce AMT below TMT," end quote. As I previously
16 explained, this alternative meaning is not only
17 semantically unreasonable, it is nonsensical.
18 Furthermore, once the BOE determined incorrectly that the
19 tax in subdivision (d) was ambiguous, it failed to apply
20 the correct legal analysis as required by California's
21 Supreme Court precedent in *People versus Woodhead* and
22 *Yamaha Corporation of America versus State Board of*
23 *Equalization* BOE.

24 My co-counsel will discuss the analysis that the
25 BOE should have employed, and that analysis favors

1 Respondent's interpretation of subdivision (d) (1).
2 Appellant claims that BOE already reviewed its opinion and
3 determined that it was not contrary to law. However,
4 Appellant fails to indicate that the opinion on the
5 substantive issues in the case was a single-page summary
6 document that did not explain the legal basis for the
7 BOE's opinion. That is Respondent's Exhibit C.

8 The opinion on petition for rehearing is the
9 first and only opinion in which the BOE explained the
10 legal basis for its decision. At the time, like today,
11 there is no procedural basis for a petition or rehearing
12 on an opinion on petition for rehearing. Therefore, this
13 is the first time the FTB has had the opportunity to even
14 address the NASSCO opinion. The NASSCO opinion was
15 incorrect in 2010, and it is incorrect today. Therefore,
16 the OTA should overturn NASSCO and remove its precedential
17 status.

18 Pursuant to California Code of Regulations
19 Title 18 section 30503, OTA may withdraw in whole or in
20 part the precedential status of an opinion, including a
21 State Board of Equalization opinion on a subject over
22 which OTA has jurisdiction previously designated as
23 precedential. FTB does not make this request to overturn
24 a precedential BOE opinion lightly. We understand the
25 significance of overturning NASSCO. However, a precedent

1 should be set aside if it has proven to be unworkable in
2 practice and poorly reasoned. Overturning NASSCO is
3 entirely consistent with California Supreme Court
4 precedence. In the People versus Latimer, the Court
5 stated, quote, "The reasons for adhering to stare decisis
6 are outweighed by the reasons for reconsidering and
7 correcting an erroneous rule," end quote.

8 The BOE's opinion in NASSCO creates such an
9 erroneous rule that is incompatible with the plain
10 language of the statute and inconsistent with the purpose
11 of the AMT that all taxpayers pay their fair share.
12 Having explained the proper operation of section 23036 and
13 23609, the lack of ambiguity within subdivision (d)(1),
14 the errors in the BOE's opinion in NASSCO and why the OTA
15 should remove its precedential status, I will turn to my
16 co-counsel Mr. Lewallen who will discuss the parties'
17 exhibits and the proper legal analysis that the OTA should
18 apply only if it first determines that subdivision (d) is
19 ambiguous, which it should not.

20 MR. Lewallen: Only if OTA finds that section
21 23036 is ambiguous, which is demonstrated it is not,
22 should OTA engage in further statutory construction
23 analysis. To analyze ambiguous statutory language, courts
24 may consider extrinsic evidence to determine the meaning
25 of a statute. The extrinsic evidence that a court may

1 consider can be grouped into three broad categories, which
2 I will discuss as follows. The first is the
3 administrative agency's interpretation; the second is the
4 objective of legislation, including legislative history
5 and public policy; and the third is the statutory scheme
6 of which the statute is a part.

7 I'll begin with FTB's interpretation of section
8 23036. The degree of deference given to an agency's
9 interpretation is governed by the California Supreme Court
10 case *Yamaha Corp of America versus State Board of*
11 *Equalization*. In that case, the Court held that the
12 appropriate degree of judicial scrutiny in administrative
13 agency's rules and regulations in any particular case is
14 not a precise formulation, but lays somewhere along a
15 continuum with non-review ability at one end and any
16 exercise of independent judgment at the other. A court
17 assessing the value of an interpretation must consider
18 factors material to the substantive legal issue before it,
19 the particular agency offering the interpretation and the
20 comparative weight the factors ought to command.

21 In its precedential 2023 opinion, *Appeal of*
22 *Southern Minnesota Beet Sugar*, OTA summarized these
23 factors as follows: One, the technical expertise of the
24 agency and the complexity of the matter; two, whether the
25 agency's interpretation has been consistent; and three,

1 whether the interpretation has been formally adopted in
2 regulations.

3 In this case, FTB has extensive expertise in
4 administering its tax programs, including, as relevant
5 here, a complex area such as AMT. This factor should
6 weigh in favor of deference to FTB's interpretation of
7 section 23036. Although, FTB's interpretation has not
8 been formally adopted in regulations, its interpretation
9 is supported, not only by the plain language of the
10 statute, but also by FTB's longstanding and consistent
11 interpretation of the statute. This interpretation, that
12 is that section 23036 subdivision (d) refers exclusively
13 to the tax as defined under subdivision (a), is evident
14 through FTB's published instructions and tax forms that
15 date back to 1988.

16 FTB's Exhibit E consists of copies of
17 instructions for FTB Form 100 insofar as it relates to
18 AMT, as well as the relevant portion of Form 100 where
19 taxpayers compute and report their AMT liability. FTB has
20 included tax forms and instructions for the taxable years
21 1988 through 1994 inclusive. These instructions and
22 corresponding forms clearly set forth FTB's interpretation
23 of the intent of section 23036 by specifying which credits
24 may reduce regular tax down to the TMT, which credits may
25 reduce regular tax below TMT, and which credits may reduce

1 AMT. For example, the instructions and tax forms for
2 these years correctly show that the only tax credits that
3 may reduce AMT are the credits for solar energy and
4 commercial solar energy systems as provided for under
5 former sections 23601 and 23601.4, respectively.

6 The plain language of former section 23601.4
7 specifically allowed the commercial solar energy system
8 credit to be taken against AMT. FTB's instructions
9 informs, therefore, correctly state that, "The former
10 commercial solar energy credit -- system credit may reduce
11 AMT. Former section 23601 specifically allowed the credit
12 for solar energy systems against the taxes imposed by this
13 part," -- and that's in quotations -- except for the
14 minimum franchise tax and tax on preference income.

15 The phrase, "This part," in quotations refers to
16 part 11 of the Revenue & Taxation Code known as the
17 corporation tax law under which the corporate AMT is
18 found. Because AMT is a tax imposed by part 11 and former
19 section 23601 did not explicitly prohibit the solar energy
20 system credit for reducing AMT, FTB's instructions and
21 forms correctly state that the solar energy system credit
22 may reduce AMT. FTB has also included, in its Exhibit E,
23 FTB instructions and forms for 2010 and 2015 to
24 demonstrate how these forms were updated following the
25 BOE's decision in NASSCO. These forms reflect the BOE's

1 opinion that the easy hiring credit and the MIC may reduce
2 AMT, notwithstanding the fact that neither of these
3 credits authorizing statutes specifically allow for these
4 credits to re -- to be claimed against AMT.

5 Apart from FTB's demonstrated longstanding and
6 consistent interpretation of section 23036 is the
7 legislature's and public's acquiescence to and adoption
8 thereof. In its concurring Yamaha opinion, Justice Mosk
9 states that an agency's interpretation of a statute is
10 owed judicial deference when it's relied upon by the
11 business community and the general public to order their
12 affairs and, after sufficient passage of time, it's
13 presumptively accepted by the legislature, such is the
14 case here. As I previously discussed, the public and
15 business community have relied on FTB's interpretation as
16 communicated on its tax forms and instruction manuals
17 since the late 80s. In other words, taxpayers have relied
18 on FTB's interpretation of section 23036 in computing
19 their regular tax and AMT liabilities.

20 As discussed earlier, because the plain language
21 of section 23036 is unambiguous, OTA should not resort to
22 legislative history to determine the intent of the
23 legislature. However, the legislative history of section
24 23036 shows that the legislature's interpretation of the
25 application of the research credit is consistent with

1 FTB's interpretation thereof. This leads to the second
2 category of extrinsic evidence that courts may use to
3 resolve ambiguity in a statute, the objectives of
4 legislation, including legislature history in examining
5 the legislative history of section 23036.

6 However, we are faced with both practical and
7 legal limitations. The first is that, according to the
8 California Secretary of State, the California legislature
9 does not transcribe hearings and other daily activities
10 like the United States Congress does for its own
11 legislative activities. As a result, there are many
12 legislative hearings for which no verbatim transcript
13 exists. Second, even where statutory language is
14 ambiguous and a review of legislative history is
15 appropriate, legislative history must shed light on the
16 collegial view of the legislature as a whole. For
17 example, in the California Supreme Court case, Quintana
18 versus Mercury Casualty, the Court held that the
19 statements of an individual legislature, even including
20 the author of the bill, are generally not considered in
21 construing a statute, as the Court's task is to ascertain
22 the intent of the legislature as a whole in adopting a
23 piece of legislation.

24 In addition, the Court of Appeal in Halbert's
25 Lumber versus Lucky Stores Incorporated stated that while

1 the language of the statute has been lobbied for and
2 against studied, proposed, drafted, restudied, redrafted,
3 voted on a committee, amended, re-amended, analyzed,
4 re-analyzed, and then voted on by two houses of the
5 legislature, among other activities, such cannot be said
6 of any other document that may make up a statute's
7 legislative history.

8 Appellant has submitted several documents that
9 purport to represent the legislative history of section
10 23036 as it relates to the research credit. Among these,
11 as we've discussed, include Exhibit 2, which consists of a
12 proposal of the contents of AB 802 from 1988. This added
13 the research credit to 23036 subdivision (d); Exhibit 3
14 consisting of a letter from AB 802's governor -- or
15 AB 802's sponsor to the governor; Exhibit 4, a bill
16 analysis from an unrelated credit; Exhibit 5, consisting
17 of documents from the governor's Office of Planning and
18 Research related to legislation for credits, also
19 unrelated to the research credit; Exhibit 6, which is a
20 1992 document containing FTB's preliminary findings on AMT
21 statutory provisions; and Exhibit 7, a 1992 third-party
22 manual on California income tax laws.

23 Apart from the bill analysis for an unrelated
24 credit, there's no evidence showing that these documents
25 were ever presented to the legislature for consideration

1 or for discussion, such that these documents cannot be
2 said to represent the collegial view of the legislature as
3 a whole. Therefore, these documents should not be
4 considered part of the legislative history of section
5 23036 for purposes of ascertaining the intent of the
6 legislature regarding the research credit.

7 Furthermore, while Appellant has selected a
8 handful of instances where it is suggested that the
9 research credit may reduce AMT, FTB's Exhibit D sets forth
10 numerous other examples of legislative history stating the
11 correct application of the research credit to reduce
12 regular tax below TMT. Exhibit D contains at least four
13 separate bill analyses from various legislative committees
14 that state the correct intent of AB 802, as relevant here,
15 was to add the research credit to the list of those which
16 are allowed to reduce regular tax below TMT. These
17 examples can be found on pages 5, 13, 20, and 28 of
18 Exhibit D, some of which were read aloud by Appellant's
19 counsel today.

20 So rather than ignoring the legislature history,
21 as also stated by Appellant's counsel earlier, FTB has
22 reviewed and submitted the legislative history across
23 nearly two decades following AB 802 and has found that the
24 legislature has used nearly identical language and bill
25 analyses for other credits under section 23036 each

1 stating that these credits are to be added to the list of
2 credits that may reduce regular tax below TMT. These
3 include AB 57 in 1993 for the enterprise zone hiring and
4 sales tax credit. This is Respondent's Exhibit D, pages
5 41 and 42. AB 1173 in 2013 for the motion picture tax
6 credit, which is found on pages 45, 93, and 96 of
7 Exhibit D. And AB 1115 from 2001. This is found on pages
8 77 through 92.

9 The legislature also demonstrates its
10 understanding for the difference between credits that may
11 reduce AMT versus credits that may reduce regular tax
12 below TMT. This relates to the order in which these
13 respective credits may be applied, requiring that any AMT
14 credits may be applied before any credit that can reduce
15 regular tax below TMT.

16 Nevertheless, a final and perhaps overlooked
17 limitation of examining legislative history is the
18 inevitability of human error and inconsistency. For
19 example, an analysis of AB 1313 from 1994 -- this is on
20 page 9 -- 67 of Exhibit D -- as it relates to the Los
21 Angeles Revitalization Zone credit, states that the credit
22 may reduce, quote, "The tentative alternative minimum
23 tax," and this was also read aloud by Appellant's counsel
24 today. Once again, that is tentative alternative minimum
25 tax. There is no such thing as a tentative alternative

1 minimum tax. Rather, the analysis clearly conflates TMT
2 with AMT.

3 Two separate bill analyses from AB 1839 from
4 2014, as it relates to the motion picture tax credit, also
5 erroneously used AM -- TMT and AMT interchangeably. An
6 analysis for the assembly committee on Revenue &
7 Taxation -- this is page 116 of Exhibit D -- initially
8 states that the credit will not be expressly added to the
9 list of credits that may reduce regular tax below TMT.
10 These are found under subdivision (d) (1).

11 In a subsequent Assembly Appropriations Committee
12 analysis for the same bill, the authors proposed an
13 amendment to, quote, "Conform to existing law by allowing
14 the credit to be used to reduce a recipient's tax below
15 the AMT and therefore, fully monetize the credit," end
16 quote. Simply based on the language used, this is clearly
17 an example of one committee incorrectly substituting AMT
18 for TMT. Even if we were to accept the appropriation
19 committee's use of the term AMT, their reasoning for the
20 amendment is a non sequitur. Because, as explained
21 earlier, the existing motion picture tax credits were only
22 able to reduce regular tax below TMT, not AMT.

23 Yet, another error is apparent in an analysis
24 from AB 2574 from 2014 as it relates to the GO-Biz
25 California Competes credit. This is found on pages 126

1 through 128 from Exhibit D, and was also read aloud by
2 Appellant's counsel today. This states the bill would
3 allow taxpayers to use the credit to, quote, "Reduce TMT."
4 As my colleague has already explained, TMT is not a tax.
5 Rather, it is used in the computation to calculate AMT.
6 Therefore, while there are credits that may reduce regular
7 tax below TMT, thus generating an AMT liability, it is
8 inaccurate to state that a credit may reduce TMT.

9 Therefore, the purported legislative history on
10 which Appellant relies, including a few instances from
11 AB 802 and other miscellaneous statutes where it may state
12 that the research credit, or other credits as discussed,
13 which included the college access credit and the aircraft
14 credits, these may very well be other examples of the
15 legislature erroneously conflating reducing AMT with
16 reducing regular tax below TMT.

17 Lastly, the third category of extrinsic evidence
18 courts may use in resolving legislative ambiguity is
19 looking to the statutory scheme of which the statute is a
20 part. Courts must read statutes as a whole so that all
21 parts are harmonized and given effect. As discussed
22 earlier for purposes of part 11, section 23036 defines tax
23 as the corporation franchise tax, the corporation income
24 tax, the tax on unrelated business taxable income of
25 exempt organizations, and the tax imposed on California

1 S corporations.

2 Subdivision (b) clarifies that only four
3 specifically identified provisions contained in part 10.2
4 of the Revenue & Taxation Code. The term tax also
5 includes certain provisions contained in part 11, such as
6 AMT. As such, the tax referenced in subdivision (d)(1),
7 which is found not only under part 11, but also within the
8 same statute in which term tax is defined for purposes of
9 part 11 does not include AMT. In summary, the definition
10 of tax for purposes of subdivision (d)(1) must be examined
11 in the context of the statute. And as explained, the only
12 logical answer is that definition set forth in subdivision
13 (a).

14 If you will indulge me by way of analogy, the
15 classic anecdote from 20th Century linguist and fire
16 prevention engineer Benjamin Lee Whorf involves his
17 inspection of a chemical plant with two storage rooms for
18 gasoline barrels; one for the full barrels and one for the
19 empty ones. Whorf observed that the chemical plant's
20 employees never smoked in the room with the full barrels,
21 but that several employees smoked in the rooms marked as
22 having empty barrels. As one can imagine in a chemical
23 plant, the supposedly empty barrels were significantly
24 more dangerous when exposed to open flame due to the
25 flammable vapors still contained therein. Whorf concluded

1 that the employees saw the word empty and assumed the most
2 expansive and ultimate definition of that word, rather
3 than taking the word into context of being an empty
4 gasoline barrel that still likely contained flammable
5 residue.

6 Here, Appellant has taken the word tax out of its
7 context of the statute in which it is clearly defined that
8 Appellant has incorrectly expanded its meaning beyond the
9 statute's plain language, which could render the entire
10 statute inoperable. In other words, Appellant has struck
11 a match next to a gasoline barrel marked empty while
12 failing to look around and note it is still located inside
13 a chemical plant.

14 Based on the foregoing, FTB's longstanding and
15 consistent interpretation of section 23036, it's its
16 legislature history, and the statutory scheme of which the
17 statute is a part, all support FTB's position that the
18 research credit may not be used to reduce AMT.

19 MR. MILLER: And to summarize our presentation,
20 Respondent has established that sections 23036 and 23609
21 are unambiguous, and they do not permit Appellant to
22 reduce its AMT liability by utilizing the California
23 research credit. Respondent has also explained the
24 rationale and imperative for overturning NASSCO, and OTA's
25 authority for doing so. Lastly, Respondent has

1 established that even if the OTA determines section 23036
2 subdivision (d)(1) to be ambiguous, the Franchise Tax
3 Board's interpretation is the proper interpretation that
4 is consistent with legislative intent and consistent with
5 the purpose of the AMT, that all taxpayers pay their fair
6 share.

7 Accordingly, Respondent request that the OTA
8 correct the BOE's legal error and remove the precedential
9 status of NASSCO. Additionally, Respondent requests that
10 the OTA hold that based on the plain language of section
11 23036 subdivision (d)(1)(D) and the plain language of
12 section 23609, Appellant may not utilize its research
13 credit to reduce its AMT. On this basis, Respondent
14 requests that the OTA sustain the Franchise Tax Board's
15 Notice of Action affirming its Notice of Proposed
16 Assessment.

17 Thank you. And, at this time, we are happy to
18 answer any questions that the panel may have.

19 JUDGE JOHNSON: Thank you.

20 We'll turn to the panel for any questions,
21 starting with Judge Gast.

22 JUDGE GAST: Yeah. I'm not sure if Mr. Miller
23 got a chance to look at 23609 when it was first enacted
24 and how it disallowed the use of the credit against the
25 AMT. It was explicit, and then that was removed by

1 SB 1801. I don't know if you had any thoughts on that or
2 comments.

3 MR. MILLER: There we go. I don't have any
4 comments other than to say we're dealing with the current
5 version which explicitly references the definition set out
6 in subdivision (a)(1) of 23036. And that's the version
7 we're dealing with regard to Appellant's taxable year of
8 2015. I don't want to pontificate about what the
9 legislature intended without documents before us.

10 JUDGE GAST: Okay. Thank you. I have no further
11 questions.

12 Thank you.

13 And Judge Lambert?

14 JUDGE LAMBERT: I don't have any questions.
15 Thanks.

16 JUDGE JOHNSON: And I have no questions at the
17 time for myself, so we'll turn back to Appellants.

18 You have up to 30 minutes for rebuttal.

19 MS. HUANG: Thank you.

20

21 CLOSING STATEMENT

22 MS. HUANG: All right. So I apologize in advance
23 if I'm going to jump around a little bit, but it's more
24 according to my notes as Respondent was speaking.

25 So first of all, I'd like to say that while it is

1 agreed that the -- the reason for the AMT is to make sure
2 that corporations pay some tax. However, as I've stated
3 earlier, there are some tax credits that the California
4 legislature have found to be of overriding importance,
5 that they're willing to let the taxpayers reduce their AMT
6 with those tax credits.

7 When Respondent is talking about how this is
8 unfair, if -- if taxpayer are allowed to use their tax
9 credits -- their research tax credits to reduce the AMT
10 because they're highly profitable, and if allowed to do
11 so, then they will reduce their tax to zero. However, by
12 Respondent's own admission, if the regular tax is above
13 the TMT, that taxpayer can reduce their tax to zero. So
14 how does that square with the policy that Respondent just
15 said that every taxpayer should pay something. It
16 doesn't.

17 And in terms of -- the next thing is that FTB
18 Respondent says that Appellant has not referenced 23609.
19 That is not at issue here. The credits claimed, the
20 amounts claimed, not at issue. FTB does not dispute what
21 we have claimed. They're -- they're disputing whether we
22 can claim it to reduce the AMT. 23609 does not matter to
23 this issue. The FTB tried to argue that again in NASSCO
24 as well, talking about how the easy hiring credit and the
25 MIC did not include a section saying that you could reduce

1 it -- use it to reduce the AMT. And the BOE also disagree
2 with them on that point. But looking at 23036 (d) it says
3 here, notwithstanding any other provisions of this part.
4 Notwithstanding any other provisions of this part. We're
5 looking at 23036. 23609, since the R&D credit amount is
6 not at issue, is irrelevant.

7 I think next the FTB talks about how Appellant
8 lacked candor by not including all leg. history. I think
9 Appellant is being disingenuous here. For the entire
10 two-and-a-half years we've been doing this appeal. All
11 the briefings, even prior to that during protest, the
12 years during audit, nothing has been said about
13 leg. history. Legislature history has not been mentioned,
14 except until 14 days ago with Exhibit D, 137 pages.
15 137 isn't -- FTB claims includes all leg. history to --
16 relating to all the credits in subdivision (d)(1). That
17 is clearly not true. Clearly not true. So who lacks
18 candor here? As I stated, there are other credits that
19 were added after the GO-Biz, and the last bill in
20 Exhibit D relates to GO-Biz credit.

21 As for whether NASSCO should be overturned,
22 Respondent referenced several cases. We would like to
23 point to this panel also other cases. In Lucent
24 Technologies, we have here that while courts may have some
25 latitude to disregard decisions of the sister courts, they

1 only exercise that latitude when there is good reason to
2 do so. Courts are especially hesitant to overturn prior
3 decisions where, as here, the issue is a statutory one
4 that our legislature has the power to alter.

5 This is what we're talking about here. We are
6 talking about the statute. FTB says their interpretation
7 is the only current one. No other interpretation. While
8 they -- they agree that SBE could be a reasonable agency,
9 they have stated throughout their briefs that the SBE's or
10 the BOE's reasoning is flawed, nonsensical, and contrary
11 to law; the reasoning. We are not talking about whether
12 the BOE itself is, you know, is a reasonable agency. We
13 are talking about reasoning 'cause that's what Respondent
14 has put before this panel, is that question; whether the
15 NASSCO decision is sound; whether it's supported by law;
16 whether it is a reasonable interpretation; whether --
17 whether it was correct. Not whether the FTB like the
18 decision, agree with the decision. That is not the
19 standard here.

20 The burden is on the party that is trying to
21 overturn the decision. And here in this case that is
22 Respondent. That is the FTB. They have the burden.
23 Courts do not overturn prior decisions, even of sister
24 courts, easily. They don't do it frivolously. They don't
25 do it, you know, just because one of the parties didn't

1 like the prior decision. For the stability of the legal
2 system, predictability, reliability, a prior case, even of
3 a sister court, cannot be overturned without really good
4 reason, without substantial justification. And FTB has
5 not -- has not provided that, other than it just disagrees
6 with the NASSCO decision.

7 And in terms of ambiguity, I would like to read
8 to -- for this panel the Hoechst Celanese, which, as you
9 know, is a California Supreme Court decision. It says
10 here, "If it is susceptible" -- basically, the statutory
11 language -- "if it is susceptible to more than one
12 reasonable interpretation, then we look to extrinsic aids,
13 including ostensible objects to be achieved, the evils to
14 be remedied, the legislative history public policy
15 contemporaneous administrative construction and the
16 statutory scheme of which the statute is a part of."

17 In Lungren, as I noted earlier, it also says that
18 court looks to the legislative history for clues of
19 legislative intent, and intent prevails over the letter,
20 and the letter will, if possible, be read as to conform to
21 the spirit of the act.

22 And lastly, Coburn, which is also mentioned by
23 the FTB. In Coburn it says latent -- here it says --
24 pardon me. It says because legislative intent prevails
25 over the words actually used. However, where a party

1 argues a latent ambiguity exists, a court may not simply
2 adopt a literal construction in its inquiry. A latent
3 ambiguity exists where some extrinsic evidence creates a
4 necessity for interpretation or a choice among two or more
5 possible meanings. Such a necessity is present where a
6 literal construction would frustrate, rather than promote
7 the purpose of the statute.

8 So all this tells us that we need to look at the
9 leg. history. There -- it's ambiguous, as I noted. You
10 know, the FTB has not addressed the fact that -- FTB likes
11 to say -- or pardon me. FTB has argued that 23036 (a) (1)
12 defines tax to include only these. As I explained
13 earlier, includes -- the word includes means it's not
14 exhaustive. It's not limiting. It's not the same as
15 means or defined as or includes only. (D) (1) has the word
16 tax, but is not defined. It has the word -- or it has the
17 term tentative minimum tax. That is defined. And then
18 again, I -- going to 23036(i), there it talks about
19 regular tax also defined.

20 Therefore, in the same statute, you have some
21 parts that have definition, some parts that do not have
22 definitions. And yet, the FTB wants you to find that
23 there is only one interpretation. That somehow the quoted
24 term tax under (d) (1) must mean greater tax. It is simply
25 not supported by the statute and therefore, we must look

1 at the legislative history.

2 FTB then argues that Appellant carefully selected
3 certain excerpts. Again, this is not true. These
4 excerpts clearly show we are not -- we did not. Appellant
5 did not choose these because these are the only ones that
6 support us. Even the Appellant's -- I mean, Respondent's
7 Exhibit D, as I noted and read through earlier, are
8 replete with examples where it is absolutely clear that
9 these credits can be taken against AMT. However, the FTB,
10 instead of trying to explain that away, simply says oh,
11 they must be confused. They didn't mean to use that term.
12 Oh, they must have confused this term with that term.

13 I'm -- this is sort of a pattern for the FTB in
14 this case. If they disagree with you, you're nonsensical.
15 If they disagree with you, your reasoning is flawed. If
16 they disagree with what's on paper, then oh, the author
17 misunderstood. They don't know what they mean. Yet,
18 apparently, in all these statements, FTB's message is only
19 we are correct. Nobody else is. How can that be? That
20 is not how tax law is made, that whatever FTB says is the
21 law. That is why we have the OTA. That is why we have
22 the courts. That is why we have debate among the
23 legislatures when these things are put forth.

24 While the FTB claims that, for example, that the
25 letter that Mr. Klehs wrote to the governor and urging him

1 to sign. That was a letter, just a letter. However, that
2 was the letter explaining to the governor of California
3 why this bill is necessary and why they should sign it.
4 That is not important? That doesn't mean anything? How
5 can that be? It -- it's -- it's an -- it's impossible to
6 believe that all this, all this document means nothing.

7 So when FTB puts forth their own 137 pages of
8 exhibits, what does it mean? They -- they selectively
9 choose the ones that go -- that seem to support their
10 position, but those that don't, then people are confused.
11 That cannot be how this case is viewed. That cannot be
12 how law is -- tax law is determined. And one last thing
13 is the FTB claims that, you know, taxpayer is not -- I
14 assume this is what FTB's arguing, that taxpayer is not at
15 a disadvantage because if they cannot use the credits to
16 reduce their AMT in the current year, they can carry
17 forward.

18 Why is a taxpayer in a similar situation using
19 the same credits that are encouraged by the legislature
20 for purposes of that economic activity be treated any
21 different just because their TMT is higher than their
22 regular tax versus the other way around? Why should I
23 have to wait another year? And what happens if next year
24 their TMT is also above their regular tax. They have to
25 carry it forward another year and the year after and the

1 year after that? What, in perpetuity? That cannot be how
2 these credits were enacted. That cannot be what the
3 legislature meant when they said some credits were of such
4 overriding importance that they're allowing them to be
5 used against AMT.

6 So in conclusion, we would just look to repeat
7 that the FTB has not demonstrated that NASSCO was wrongly
8 decided, that NASSCO should be overturned. NASSCO is a
9 15-year precedential decision. The legislature has added
10 several credits since then to subdivision (d)(1), and they
11 have all said you can use the credits against AMT.
12 There's ambiguity in 23036. Leg. history should be
13 reviewed, and the leg. history overwhelming support
14 taxpayer's position that it can use its research credits
15 to reduce its AMT.

16 And for all those reasons, we urge this panel to
17 find in favor of the taxpayer and hold that tax -- that
18 Appellant can use its research credit to reduce its AMT.

19 Thank you.

20 JUDGE JOHNSON: Thank you.

21 I will turn back to the panel for questions,
22 starting with Judge Gast.

23 JUDGE GAST: No further questions. Thank you.

24 JUDGE JOHNSON: All right. And Judge Lambert?

25 JUDGE LAMBERT: No questions. Thanks.

1 JUDGE JOHNSON: Okay. I do have a question.
2 We'll go to Franchise Tax Board. I believe you touched on
3 this in your briefing, but the FTB Notice 2011-02, it's
4 specifically worded and following NASSCO to denote that
5 NASSCO only applies to the easy hiring credit and the MIC.
6 Is there a position that you're presenting that NASSCO,
7 maybe if it's not overturned, still distinguishable, or is
8 the position solely that NASSCO is overturned, or if it's
9 not overturned, then the leg. history shows that you still
10 prevail?

11 MR. MILLER: I'm sorry. I want to make sure I
12 answer your question or questions. It sounded like you
13 had several. So if you could -- could you ask the first
14 one first? And I'm happy to answer all of them.

15 JUDGE JOHNSON: Sure. Sure.

16 MR. MILLER: Thanks.

17 JUDGE JOHNSON: Is there an argument that NASSCO
18 is distinguishable because the credits it dealt with
19 versus the credits here today?

20 MR. MILLER: It's distinguishable from -- yeah,
21 the NASSCO decision did not to deal with the research
22 credit, right. So it's distinguishable on that basis,
23 correct. But as have explained and presented, the NASSCO
24 decision is wrong and incorrect. It was wrong as
25 pertaining to the easy hiring credits and the

1 manufacturing investment as well at that time.

2 JUDGE JOHNSON: Okay. Thank you. I believe that
3 answers both questions there.

4 But I'll turn it to Appellants as well.

5 Is NASSCO distinguishable because of the credits?

6 MS. HUANG: We do not think so. NASSCO itself,
7 while it does specifically focus on easy hiring credit and
8 the MIC, it is not limited to that. It is -- it talks
9 about 23036(d)(1), whether it's ambiguous. And then it
10 talks about the MIC and the easy hiring credits because
11 those were the only credits at issue. However, it does
12 not include -- exclude other credits. However, I should
13 point out -- and I don't have the transcript in front of
14 me.

15 But during the oral arguments for NASSCO, the
16 question was posed, whether -- if 23036(d)(1), if they
17 find that there's ambiguity and that it applied -- you
18 know, that it -- all the credits under (d)(1) would also
19 be used -- be able to be used against AMT. I believe the
20 FTB and NASSCO during that oral hearing said yes. But
21 aside from that is the fact that the reasoning in NASSCO
22 should hold in this case as well. But there's ambiguity
23 in the statutory language and therefore, should look at
24 the leg. history.

25 And the leg. history here, as I noted that we

1 presented AB 802, which is specific to the research
2 credit, AB 57 which is to the easy hiring credit, which
3 the NASSCO -- BOE in NASSCO reviewed is that it references
4 the research credit. And how, just like the research
5 credit, the easy hiring and the MIC credits should be
6 allowed to reduce the AMT. And therefore, I don't think
7 NASSCO is distinguishable in that sense. The credits
8 themselves -- Respondent is correct, NASSCO did not talk
9 about a research credit specifically because that credit
10 was not at issue.

11 JUDGE JOHNSON: Okay. Thank you.

12 Along these lines, for Franchise Tax Board, I
13 know the easy hiring credit and MIC may not be relevant
14 these days. But if NASSCO were overturned, what would
15 happen to those credits, in FTB's interpretation of
16 whether those credits can be applied against the AMT going
17 forward?

18 MR. MILLER: Well, the result would depend on the
19 OTA's ruling and your holding. But as you stated, the
20 easy hiring credits and the manufacturer's investment
21 credit are really no longer relevant for the most part.
22 The manufacturer's investment credit expired in 2004, and
23 the easy hiring credit expired in 2014. And both of those
24 provisions had carry over provisions for only 10 years.
25 So the latest some taxpayer could claim a carry over for

1 an easy hiring credit would be December 2023. So those
2 really aren't coming up at issue.

3 So but depending on the OTA's ruling, you would
4 either deny the use of those credits against the AMT or
5 whatever the OTA decides to do. But that is our position.
6 We think it should be overturned completely, and any use
7 of the carry overs for the easy hiring should be
8 disallowed against the AMT.

9 Does that answer your question, Judge?

10 JUDGE JOHNSON: It does. Thank you.

11 MR. MILLER: Okay. Thanks.

12 JUDGE JOHNSON: And this might be for your
13 partner, Mr. Lewallen, up there. But going to the
14 discussion of the legislative history and the consistency
15 of the tax agency's position, should we review FTB Notice
16 2011-02 and FTB's forms and instructions and actions
17 regarding the credits at issue in NASSCO the past dozen
18 years or so, when looking at the tax agency's consistency
19 in determining whether NASSCO should be overturned? Does
20 that make sense?

21 MR. MILLER: I think I'm understanding the
22 question. If I can rephrase, are you saying should
23 we're -- should FTB Notice 2011-02 and our -- and the
24 FTB's allowance of the easy hiring and manufacturer's
25 investment credit against the AMT be used in an analysis

1 of our longstanding position?

2 JUDGE JOHNSON: Yeah. I guess I should say when
3 looking whether to overturn NASSCO, and Exhibit E talks
4 about instructions and forms.

5 MR. MILLER: Yes. Right. Well, as you know, the
6 forms changed only after NASSCO was decided to allow the
7 easy hiring and manufacturer's investment credit against
8 the AMT. We're bound -- but we were bound by the BOE's
9 precedential decision. So, of course, we follow the BOE's
10 precedential holding that required us to allow those two
11 credits against the AMT. And As I noted in my briefing,
12 you know, this is the first time that we've had an
13 opportunity to even address the NASSCO decision. Because
14 being such tax favorable decision, it's not really
15 litigated against -- by taxpayers in claim for refund
16 litigations. And the early opportunity for us to address
17 it is -- this is the first time we've had a chance to
18 actually address it and address its incorrectness.

19 Does that answer your question?

20 JUDGE JOHNSON: That absolutely does, yes.

21 MR. MILLER: Thanks.

22 JUDGE JOHNSON: Thank you. That's the last of my
23 questions, unless co-panelists has another question. All
24 right.

25 MS. HUANG: I'm sorry. Judge Johnson, if I may,

1 could I address your last point as well?

2 JUDGE JOHNSON: Yes, please do.

3 MS. HUANG: Okay. So in terms of the
4 longstanding FTB position in overturning NASSCO -- I think
5 that was your question, if I understood correctly. I
6 don't think that should be considered. Because the FTB,
7 as I noted earlier, you know, in -- in 1992, FTB took a
8 position that is the same as the NASSCO position. Even
9 today, the FTB does not address why that decision --
10 that -- that analysis -- that analysis that studied that
11 report that took over five years to put together is
12 somehow wrong, you know.

13 And I know the FTB referenced Yamaha. But, you
14 know, you cannot consider an agency decision in term -- as
15 being longstanding if it vacillates, and it did. So, you
16 know, I do not believe that FTB's quote, unquote,
17 "longstanding position on this issue should be the reason
18 to overturn NASSCO."

19 Thank you.

20 JUDGE JOHNSON: Thank you.

21 With that, we are ready to submit the case. The
22 evidence has been admitted into the record, and we have
23 the arguments and your briefs, as well as your oral
24 arguments presented today. Thank you for those. We now
25 have a complete record from which to base our decision.

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Any final questions before we conclude today from Appellants?

MS. HUANG: No.

JUDGE JOHNSON: Thank you.

And from Respondent?

MR. MILLER: No. Thank you.

JUDGE JOHNSON: Thank you.

I wish, again, to thank both parties for their efforts in this matter. This concludes the hearing for this appeal. The parties should expect our written opinion no later than 100 days from today.

With that, we are now off the record.

(Proceedings concluded at 3:29 p.m.)

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HEARING REPORTER'S CERTIFICATE

I, Ernalyne M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 12th day of December, 2025.

ERNALYN M. ALONZO
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