

1 JON WALLACE UPTON, SBN 46089
2 KIMBLE, MACMICHAEL & UPTON
3 Fig Garden Financial Center
4 5260 North Palm Avenue, Suite 221
5 Fresno, California 93792-9489
6 Telephone: (559) 435-5500
7 Facsimile: (559) 435-1500

8 RAYMOND B. LUDWISZEWSKI *Pro Hac Vice*
9 CHARLES H. HAAKE, SBN 190178
10 GIBSON, DUNN & CRUTCHER LLP
11 1050 Connecticut Ave. NW
12 Washington, D.C. 20036
13 Telephone: (202) 955-8500
14 Facsimile: (202) 467-0539

15 Attorneys for Plaintiff-Intervenor,
16 Association of International Automobile Manufacturers

17 UNITED STATES DISTRICT COURT
18 EASTERN DISTRICT OF CALIFORNIA – FRESNO

19 CENTRAL VALLEY CHRYSLER-JEEP, INC.,
20 et al,

21 Plaintiffs,

22 v.

23 Catherine E. WITHERSPOON, in her official
24 capacity as Executive Officer of the California
25 Air Resources Board,

26 Defendant,

27 THE ASSOCIATION OF INTERNATIONAL
28 AUTOMOBILE MANUFACTURERS

Plaintiff-Intervenor,

SIERRA CLUB, NATURAL RESOURCES
DEFENSE COUNCIL, ENVIRONMENTAL
DEFENSE, BLUEWATER NETWORK,
GLOBAL EXCHANGE and RAINFOREST
ACTION NETWORK,

Defendant-Intervenors.

CASE NO. CIV-F-04-6663-AWI-LJO

**MEMORANDUM OF POINTS AND
AUTHORITIES OF PLAINTIFF
INTERVENOR, ASSOCIATION OF
INTERNATIONAL AUTOMOBILE
MANUFACTURERS, IN OPPOSITION TO
DEFENDANTS' MOTION FOR
JUDGMENT ON THE PLEADINGS**

DATE: September 15, 2006
TIME: 9:00 a.m.
JUDGE: Anthony W. Ishii

TABLE OF CONTENTS

1

2

3 TABLE OF AUTHORITIES iii

4 I. INTRODUCTION 1

5 II. FACTUAL AND REGULATORY BACKGROUND 2

6 A. There Is A Direct, Inextricable, And Mathematical Relationship Between

7 Carbon Dioxide Emissions and Fuel Economy. 2

8 B. The National Highway Traffic Safety Administration Regulates Fuel Economy

9 Through The Federal CAFE Program..... 5

10 1. Congress Created A Nationwide Fuel Economy Program By

11 Preempting Any State Regulation Of Fuel Economy. 5

12 2. EPCA Requires A Balancing Of Criteria In Arriving At The

13 “Maximum Feasible Average Fuel Economy Level.” 6

14 C. The AB 1493 Regulations Impose De Facto Fuel Economy Standards That

15 Conflict With The CAFE Standards. 10

16 1. The AB 1493 Regulations Place Limits On Emissions of Carbon

17 Dioxide From Motor Vehicles. 10

18 2. The AB 1493 Regulations Mandate The Use Of Technologies That

19 Improve Fuel Economy 13

20 3. In Establishing The AB 1493 Regulations, CARB Did Not Weigh The

21 Criteria NHTSA Is Required To Weigh 14

22 III. ARGUMENT 15

23 A. The AB 1493 Regulations Are Preempted By EPCA..... 15

24 1. This Court Should Defer To NHTSA’s Determination Concerning

25 Whether Carbon Dioxide Regulations Are Preempted By EPCA And

26 Conflict With CAFE. 16

27 2. AIAM Has Alleged Sufficient Facts To Establish It Is Entitled To

28 Injunctive Relief..... 19

a) Because Of The Direct And Inextricable Relationship Between

CO2 Emissions And Fuel Economy, The AB 1493 Regulations Are

Related To Fuel Economy Regulations..... 20

b) Carbon Dioxide Emissions Are Different From Other Vehicular

Emissions And NHTSA Is Not Required To Take State CO2

Regulations Into Account In Setting Fuel Economy Standards..... 22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- c) The AB 1493 Regulations Are Also Impliedly Preempted By EPCA..... 24
- B. Section 209 Of The Clean Air Act Does Not Save The AB 1493 Regulations From EPCA Preemption. 27
 - 1. Section 209 Of The Clean Air Act Was Not Intended To Allow California To Address Issues Of Global Warming 27
 - 2. Section 209 Must Be Read In Connection With Section 177 Of The Clean Air Act 30
 - 3. The Clean Air Act Amendments of 1990 Specifically Eschewed Direct Regulation Of CO2 And Instead Opted For A Number Of Non-Regulatory Means For Addressing Issues of Global Climate Change..... 31
 - 4. Section 209(b) Of The Clean Air Act Does Not Abrogate EPCA’s Preemption Provision By Mere Implication. 32
- IV. CONCLUSION 33

TABLE OF AUTHORITIES

Cases

1

2

3

4 *Agostini v. Felton*,
521 U.S. 203, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997)..... 22

5 *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm’n*,
6 410 F.3d 492 (9th Cir. 2005)..... 22

7 *Aloha Airlines v. Dir. of Taxation*,
8 464 U.S. 7, 104 S. Ct. 291, 78 L. Ed. 2d 10 (1983)..... 20

9 *Bank of America v. City & County of San Francisco*,
309 F.3d 551 (9th Cir. 2002)..... 15, 16, 19, 24

10 *Bayview Hunters Point Community Advocates v. Metropolitan Transp. Com’n*,
366 F.3d 692 (9th Cir 2004)..... 3

11 *Blue Cross & Blue Shield, Inc. v. Department of Banking & Finance*,
12 791 F.2d 1501 (11th Cir. 1986)..... 17

13 *Brannan v. United Student Aid Funds, Inc.*,
94 F.3d 1260 (9th Cir. 1996)..... 17

14 *Buckman Co. v. Plaintiffs’ Legal Comm.*,
15 531 U.S. 34, 121 S. Ct. 1012, 148 L. Ed. 2d 854 (2001)..... 19

16 *California Advocates for Nursing Home Reform v. Bonta*,
106 Cal. App. 4th 498, 130 Cal. Rptr. 2d 823 (2003)..... 14

17 *Californians For Safe & Competitive Dump Truck Transp. v. Mendonca*,
18 152 F.3d 1184 (9th Cir. 1998)..... 22

19 *Cent. Valley Chrysler-Plymouth v. Cal. Air Res. Bd.*,
No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 (E.D. Cal., June 11, 2002)..... 19

20 *Center for Auto Safety v. National Highway Traffic Safety Administration*,
21 793 F.2d 1322 (D.C. Cir. 1986)..... 8, 10

22 *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,
467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)..... 17

23 *Columbia Union College v. Clarke*,
24 159 F.3d 151 (4th Cir. 1998)..... 22

25 *Competitive Enterprise Inst. v. National Highway Traffic Safety Administration*,
956 F.2d 321 (D.C. Cir. 1992)..... 9

26 *District of Columbia v. Greater Washington Bd. of Trade*,
27 506 U.S. 125, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992)..... 22

28 *Edgar v. MITE Corp.*,
457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed.2d 269 (1982)..... 25

1 *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*,
 541 U.S. 246, 158 L. Ed. 2d 5, 124 S. Ct. 1756 (2004)..... 21

2

3 *Fid. Fed. Sav. & Loan Ass’n v. De La Cuesta*,
 458 U.S. 141, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982)..... 18

4 *Florida Lime & Avocado Growers, Inc. v. Paul*,
 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963)..... 16

5

6 *FMC Corp. v. Holliday*,
 498 U.S. 52, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990)..... 21

7 *Ford Motor Co. v. Environmental Protection Agency*,
 606 F.2d 1293 (D.C. Cir. 1979)..... 29

8

9 *Gade v. National Solid Wastes Management Ass’n*,
 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)..... 19

10 *Geier v. American Honda Motor Co.*,
 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (2000)..... 17, 25, 26

11

12 *Hillsborough County v. Automated Med. Labs.*,
 471 U.S. 707, 85 L. Ed. 2d 714, 105 S. Ct. 2371 (1985)..... 17

13 *Hines v. Davidowitz*,
 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941)..... 16, 25

14

15 *Indus. Truck Ass’n v. Henry*,
 125 F.3d 1305 (9th Cir. 1997)..... 16

16 *Ingersoll-Rand Co. v. McClendon*,
 498 U.S. 133, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990)..... 21

17

18 *Massachusetts v. EPA*,
 415 F.3d 50 (D.C. Cir. 2005) cert. granted 2006 U.S. LEXIS 4910 (U.S. June 26,
 2006) 30

19

20 *Medtronic, Inc. v. Lohr*,
 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996)..... 17, 18

21 *Metropolitan Life Ins. Co. v. Massachusetts*,
 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985)..... 21

22

23 *Michigan Cannery & Freezers Ass’n, Inc. v. Agricultural Marketing & Bargaining Bd.*,
 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed.2d 399 (1984)..... 25

24 *Morales v. Trans World Airlines, Inc.*,
 504 U.S. 374, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)..... 20, 21

25

26 *Motor Vehicle Mfrs. Ass’n of the United States v. New York State Dept. of Env’tl.*
Conservation,
 17 F.3d 521 (2d. Cir. 1994)..... 29, 31

27

28 *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*,
 514 U.S. 645, 115 S.Ct. 1671, 131 L. Ed. 2d 695 (1995)..... 21, 22

1	<i>Oklahoma Natural Gas Co. v. FERC,</i>	
	28 F.3d 1281 (D.C. Cir. 1994)	17
2		
3	<i>Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n,</i>	
	461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed.2d 752 (1983)	24
4	<i>Palmer v. Liggett Group, Inc.,</i>	
	825 F.2d 620 (1st Cir. 1987)	25
5		
6	<i>Perez v. Campbell,</i>	
	402 U.S. 637, 29 L. Ed. 2d 233, 91 S. Ct. 1704 (1971)	20
7	<i>Pilot Life Ins. Co. v. Dedeaux,</i>	
	481 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)	21
8		
9	<i>Public Citizen v. National Highway Traffic Safety Admin.,</i>	
	848 F.2d 256 (D.C. Cir. 1988)	8
10	<i>Public Utility Dist. No. 1 of Grays Harbor County Wash. v. IDACORP Inc.,</i>	
	379 F.3d 641 (9th Cir. 2004)	24
11		
12	<i>Rice v. Santa Fe Elevator Corp.,</i>	
	331 U.S. 218, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)	16
13	<i>Sayles Hydro Assoc. v. Maughan,</i>	
	985 F.2d 451 (9th Cir. 1993)	25
14		
15	<i>Shaw v. Delta Air Lines, Inc.,</i>	
	463 U.S. 85, 77 L. Ed. 2d 490, 103 S. Ct. 2890	21
16	<i>Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.,</i>	
	474 U.S. 409, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986)	25
17		
18	<i>Union Pacific R. Co. v. California Public Utilities Com’n,</i>	
	346 F.3d 851 (9th Cir. 2003)	17
19	<i>United States v. Locke,</i>	
	529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000)	19
20		
21	Statutes	
22	42 U.S.C. § 7403(g)	32
23	42 U.S.C. § 7507	30, 31
24	42 U.S.C. § 7543(b)	2, 28
25	42 U.S.C. § 7671a(e)	32
26	44 U.S.C. 1507	3
27	49 U.S.C. § 23902(a)	7
28	49 U.S.C. § 32902	5
	49 U.S.C. § 32902(b)	7

1 49 U.S.C. § 32902(c) 7

2 49 U.S.C. § 32902(c)(2)..... 7

3 49 U.S.C. § 32902(f)..... 8

4 49 U.S.C. § 32919(a) 6, 20

5 **Regulations**

6 40 C.F.R. § 86.144-90..... 4

7 49 C.F.R. § 531.1 5

8 49 C.F.R. § 531.5 7

9 49 C.F.R. § 531.6(a)..... 4

10 49 C.F.R. § 533.1 5

11 49 C.F.R. § 533.6(b) 4

12 **State Statutes**

13 Cal. Code Regs. tit. 13, § 1961.1(a)(1)(B)..... 10

14 **Other Authorities**

15 123 Cong. Rec. H8662 (Aug. 4, 1977), *reprinted in* 1977 U.S.C.C.A.N. 1570 31

16 41 Fed. Reg. 25015 (1975)..... 6

17 *Average Fuel Economy Standards for Light Trucks Model Years 2008-2011,*

18 *71 Fed. Reg. 17566, 17659 (April 6, 2006) passim*

19 *California Environmental Protection Agency, Air Resources Board, Staff Report: Initial*

20 *Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider*

21 *Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles 11, 14*

22 Clean Air Act Amendments of 1977,

23 Pub.L. No. 95-95, § 207, 91 Stat. 755..... 29

24 *Control of Emissions From New Highway Vehicles and Engines,*

25 *68 Fed. Reg. 52922 (Sept. 8, 2003) 5, 19*

26 *Fuel Economy Standards--Credits and Fines--Rights and Responsibilities of*

27 *Manufacturers in the Context of Changes in Corporate Relationships,*

28 *69 Fed. Reg. 77663 (Dec. 28, 2004) 9*

H.R. Rep. No. 294, 301-02 (1977),

reprinted in 1977 U.S.C.C.A.N. 1077 29

H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967)..... 28

H.R. Rep. No. 728, *reprinted in* 1967 U.S.C.C.A.N. 1938..... 28

1 H.R. Rep. No. 94-340 (1975)..... 6, 7

2 H.R. Rep. No. 95-294 (1977),
 3 *reprinted in 1977 U.S.C.C.A.N. 1077* 30

4 *Passenger Automobile Average Fuel Economy Standards for Model Year 1989,*
 53 Fed. Reg. 39275 (Oct. 6, 1988)..... 9

5 *Passenger Automobile Average Fuel Economy Standards for Model Years 1987-88,*
 51 Fed. Reg. 35594 (Oct. 6, 1986)..... 9, 15

6 *Passenger Automobile Average Fuel Economy Standards Model Year 1986,*
 7 50 Fed. Reg. 40528 (Oct. 4, 1985)..... 8

8 *Passenger Automobile Average Fuel Economy Standards, Final Rule,*
 42 Fed. Reg. 33534 (June 30, 1977) 9

9 Pub. L. No. 101-549, 104 Stat. 2699, § 821 (1990)..... 32

10 S. Rep. No. 101-228, § 216 (1989) 31

11 S. Rep. No. 192, 89th Cong., 1st Sess. (1965)..... 28

12 S. Rep. No. 94-179 (1975) 6, 8

13 Senate Comm. on Environment and Public Works,
 14 S. Prt. 103-38 (statement of Senator Symms) *reprinted in IV A Legislative History*
 15 *of the Clean Air Act Amendments of 1990* 32

16

17

18

19

20

21

22

23

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION

Throughout this litigation, the Defendants, aided in the current motion by *Amici*, have attempted to cast this case as a broad referendum on the science of global warming and the environmental impacts of greenhouse gases. It is not. Rather, this case raises a different and much narrower question: May the State of California adopt motor vehicle greenhouse gas regulations that amount to *de facto* fuel economy standards, despite the broad prohibition in the Energy Policy and Conservation Act of 1975 (“EPCA”) forbidding States from adopting any regulation “related to” fuel economy standards?

The Defendants’ and *Amici*’s entire argument as to why the State may do so rests on a single pillar: the premise that California’s authority under Section 209(b) of the Clean Air Act defeats any claim that its greenhouse gas standards (the “AB 1493 Regulations”) are preempted by or conflict with EPCA – no matter how broadly EPCA preempts fuel economy regulations, and no matter how severely California’s regulations encroach into that preempted field. The flaw in the Defendants’ and *Amici*’s argument is two-fold.

First, they never straightforwardly address the issue of preemption under EPCA. That is, they ignore the fact that carbon dioxide regulations are functionally indistinguishable from fuel economy standards, given that CO2 emissions are a direct function of fuel economy and the only way to reduce CO2 emissions is to improve fuel economy. They also disregard the fact that the AB 1493 Regulations create a direct conflict with the federal Corporate Average Fuel Economy (“CAFE”) program, a comprehensive program administered by the National Highway Traffic Safety Administration (“NHTSA”). NHTSA is responsible for prescribing national fuel economy standards at the level it determines constitute the “maximum feasible average fuel economy level,” for a given model year. In exercising its discretion in setting the standards, NHTSA must balance a number of competing criteria in addition to improving fuel economy, such as maintaining wide consumer choice, protecting the automotive industry from adverse economic consequences, avoiding a significant loss of employment in the industry, and ensuring vehicle safety. By setting *de facto* fuel economy standards that are much more stringent than the applicable CAFE standards, the California regulations abrogate the regulatory regime established by Congress and entrusted to NHTSA. The

1 Defendants and *Amici* never address these points, and by their silence they must concede that the
 2 AB 1493 Regulations are “related to fuel economy standards” and are preempted by EPCA – unless
 3 they are correct that Section 209 of the Clean Air Act serves as a magic savings clause.

4 This leads to the second error in the Defendants’ and *Amici*’s reasoning: Given that the
 5 AB 1493 Regulations are both expressly and impliedly preempted by EPCA, they ask this Court to
 6 take the unprecedented step of holding that California’s authority under the Clean Air Act is so broad
 7 that it entirely eviscerates EPCA’s preemption provision, and essentially strips NHTSA of the
 8 authority to set nationwide fuel economy standards. In fact, California’s authority is not so
 9 expansive. Section 209 of the Clean Air Act was specifically crafted to allow California extra leeway
 10 in addressing the issue of urban smog, a matter in which the State had a keen interest and had begun
 11 to regulate before the original Clean Air Act was enacted. California’s authority, therefore, is
 12 statutorily bounded by the requirement that its regulations be necessary “to meet compelling and
 13 extraordinary conditions” unique to the State. 42 U.S.C. § 7543(b). By its very nature, global
 14 climate change is not a compelling and extraordinary condition of one State – California. To read the
 15 Clean Air Act as the Defendants and *Amici* would have this Court do would write this important
 16 limitation out of the Clean Air Act and expand California’s power to trump federal law to an
 17 unprecedented degree.

18 This action will ultimately require this Court to examine the AB 1493 Regulations challenged
 19 here and weigh the extent to which they cause violence to both EPCA’s express preemption provision
 20 and the carefully calibrated federal fuel economy regime against the extent to which they promote the
 21 purposes of the Clean Air Act. The facts that will inform this determination are limited and should be
 22 beyond any reasonable dispute. They will show that the State of California has intruded into a field
 23 long reserved for the Federal Government and is regulating the automobile industry in a manner
 24 which Congress never intended. The Motion for Judgment on the Pleadings should be denied.

25 **II. FACTUAL AND REGULATORY BACKGROUND**

26 **A. There Is A Direct, Inextricable, And Mathematical Relationship Between Carbon 27 Dioxide Emissions and Fuel Economy.**

28 There are certain, limited facts which AIAM alleges in its Complaint and which demonstrate
 that there is a direct and inextricable relationship between CO2 emissions and motor vehicle fuel

1 economy. Although the Defendants do not admit to this relationship in their pleadings, AIAM
 2 believes that it cannot be disputed.¹ As NHTSA stated in recent rulemaking “[f]uel consumption and
 3 CO2 emissions from a vehicle are two ‘indissociable’ parameters” such that “fuel economy is directly
 4 related to emissions of greenhouse gases such as CO2.” *Average Fuel Economy Standards for Light
 5 Trucks Model Years 2008-2011*, 71 Fed. Reg. 17566, 17659 (April 6, 2006) (the “Light Truck
 6 Standards”).²

7 The reason for this direct and “indissociable” relationship is a simple matter of chemistry and
 8 automotive engineering. Carbon dioxide is a natural and unavoidable byproduct of combustion of
 9 carbon-containing fuels such as gasoline, coal and natural gas. *AIAM Complaint*, ¶ 36. The
 10 relationship between fuel consumption and CO2 emissions for a given fuel is fixed and depends only
 11 on the carbon composition of the fuel that is burned. *Id.* ¶ 37. Each gallon of gasoline contains
 12 approximately 5.5 pounds (or 2,495 grams) of carbon. *Light Truck Standard* at 17659 n.201.³ When
 13 that carbon is combusted, the 2,495 grams of carbon combines with approximately 6,653 grams of
 14 oxygen from the atmosphere and becomes approximately 9,148 grams of CO2. *Id.* Thus, “[b]ased
 15 on its content (carbon and hydrogen), as a matter of basic chemistry, the burning of a gallon of
 16 gasoline produces about 20 pounds [9,148 grams] of CO2.” *Id.* at 17659; *AIAM Complaint*, ¶ 37.

17 Perfect combustion of gasoline results in just two products from the fuel in the exhaust: CO2
 18 and water. However, combustion in internal combustion engines is often incomplete, and small
 19 amounts of carbon monoxide (CO) and unburned hydrocarbons (HC) are released in the emissions.

22 ¹ The standard applicable to a motion for judgment on the pleadings is set forth in the opposition
 23 brief concurrently filed by the Central Valley Chrysler-Jeep Plaintiffs and will not be duplicated
 24 here. Suffice it to say that on a motion for judgment on the pleadings, all facts pled by the non-
 moving party must be accepted as true and construed in a light most favorable to that party.

25 ² This Court may take judicial notice of the contents of the Federal Register. 44 U.S.C. 1507 (“The
 26 contents of the Federal Register shall be judicially noticed”). *See also Bayview Hunters Point
 Community Advocates v. Metropolitan Transp. Com'n*, 366 F.3d 692, 702 n.5 (9th Cir 2004).

27 ³ These values are approximate as the carbon content of gasoline can vary seasonally and between
 28 locations. However, for any given fuel, the amount of CO2 produced is constant.

1 *Id.*⁴ However, CO₂ comprises the vast majority of the carbon-containing compounds in the exhaust.
 2 For example, NHTSA estimates that model year 2006 light trucks emit on average 471 grams of CO₂
 3 per mile driven in the city, but only 0.042 grams of HC and 0.56 grams of CO. *Id.* at 17661.

4 Measuring the total mass of the carbon-containing compounds emitted from a motor vehicle
 5 provides the most consistent gauge of the amount of fuel consumed by the vehicle. Fuel economy,
 6 therefore, is determined pursuant to EPA guidelines⁵ by measuring the exhaust emissions of HC, CO,
 7 and CO₂ per mile traveled. 40 C.F.R. § 86.144-90. After essentially “counting” the carbon atoms
 8 emitted per mile driven, EPA uses a formula found at 40 C.F.R. § 600.113-93(e), commonly referred
 9 to as the carbon balance equation, to calculate the amount of fuel burned per mile driven. However,
 10 as discussed above, CO₂ is over 99% of the carbon-containing emissions. Thus, “CO and HC play
 11 an increasingly and extremely minor role in the measurement of fuel economy, such that fuel
 12 economy has become virtually synonymous with CO₂ emission rates.” *Light Truck Standard* at
 13 17660; *see also AIAM Complaint*, ¶ 20.

14 Carbon dioxide, however, is fundamentally different from other automotive emissions that are
 15 commonly regulated by EPA and the State of California in that there is no “bolt on” aftertreatment
 16 device that can reduce its emission.⁶ There is one way – and only one way – for a manufacturer of
 17 today’s gasoline-powered automobiles to reduce tailpipe emissions of CO₂, and that is to improve the
 18 fuel economy of the vehicle so that it burns less gasoline per mile driven. *AIAM Complaint*, ¶ 39;
 19 *Light Truck Standard*, 71 Fed. Reg. at 17656 (“the only technologically feasible, practicable way for
 20 vehicle manufacturers to reduce CO₂ emissions is to improve fuel economy.”); *see also Control of*
 21 *Emissions From New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003)

22
 23 ⁴ Combustion engines also emit oxides of nitrogen (NO_x), but those compounds do not originate
 24 from the fuel. Rather, the heat from the combustion process causes the oxidation of nitrogen in
 the air flowing through the engine. *Id.*

25 ⁵ NHTSA’s regulations require that fuel economy be measured by way of “procedures established
 26 by the Administrator of the Environmental Protection Agency.” 49 C.F.R. §§ 531.6(a), 533.6(b).

27 ⁶ For example, the technologies that produce reductions in HC and CO emissions – such as
 28 catalytic converters and computer-controlled air/fuel mixture controls – do so by more completely
 combusting them to CO₂ and water. *Light Truck Standard*, 71 Fed. Reg. at 17660.

1 (“No technology currently exists or is under development that can capture and destroy or reduce
2 emissions of CO₂, unlike other emissions from motor vehicle tailpipes. At present, the only practical
3 way to reduce tailpipe emissions of CO₂ is to improve fuel economy.”)

4 These facts – which must be accepted as true – show that fuel economy and CO₂ emissions
5 are essentially the same thing. If you know how much CO₂ a vehicle emits per mile traveled, then
6 determining that vehicle’s fuel economy is a matter of a simple mathematical conversion. And if you
7 want to cause that vehicle to emit less CO₂, the only way to do that is to improve its fuel economy.

8 **B. The National Highway Traffic Safety Administration Regulates Fuel Economy Through
9 The Federal CAFE Program**

10 For all practical purposes, therefore, CO₂ emissions have been regulated by the federal
11 government since 1978 through the Corporate Average Fuel Economy (“CAFE”) program
12 established in the Energy Policy and Conservation Act of 1975, 49 U.S.C. §§ 32901, et seq. Under
13 the CAFE program, an automobile manufacturer can sell any combination of vehicles it chooses
14 without penalty, so long as the average fuel economy of its nationwide fleets meets the applicable
15 CAFE standard. 49 U.S.C. § 32902.⁷

16 There are two aspects of EPCA’s regulatory scheme that are important here. First, Congress
17 deliberately chose a nationwide approach, for it would be impractical to require the industry to
18 comply with 50 different fuel economy standards. Second, Congress delegated to NHTSA the task of
19 determining what the nationwide “maximum feasible average fuel economy level” should be, and
20 required NHTSA to balance a number of competing criteria in determining that level.

21 **1. Congress Created A Nationwide Fuel Economy Program By Preempting Any
22 State Regulation Of Fuel Economy.**

23 Prior to EPCA, no State had ever sought to regulate fuel economy. To ensure national
24 uniformity in fuel economy regulations, EPCA includes a sweeping express preemption clause at 49
25 U.S.C. §32919(a). That section provides:

26
27 When an average fuel economy standard prescribed under this chapter [49 U.S.C. §§
28 32901 et seq.] is in effect, a State or a political subdivision of a State may not adopt or

⁷ There are separate CAFE standards for passenger cars and light duty truck (which consists of pick-up trucks, SUVs and minivans). 49 C.F.R. §§ 531.1 *et seq*; 49 C.F.R. § 533.1 *et seq*.

1 enforce a law or regulation related to fuel economy standards or average fuel economy
2 standards for automobiles covered by an average fuel economy standard under this
chapter [49 U.S.C. §§ 32901 *et seq.*].

3 49 U.S.C. § 32919(a). The legislative history of EPCA’s preemption provision confirms that
4 Congress intended it to preempt broadly all regulation in the area of fuel economy. The original
5 Senate bill would have preempted State laws only if they were “inconsistent” with federal fuel
6 economy standards, labeling, or advertising. S. Rep. No. 94-179 at 25 (1975). Similarly, the House
7 bill would have preempted State laws only if they were not “identical to” a Federal requirement.
8 H.R. Rep. No. 94-340 at 274 (§ 507 as introduced, § 509 as reported) (1975). Instead of adopting
9 these more limited forms of preemption, the final version of the law expressly preempts all State laws
10 that relate to fuel economy standards, even ones that are consistent with or identical to federal
11 requirements.

12 **2. EPCA Requires A Balancing Of Criteria In Arriving At The “Maximum Feasible**
13 **Average Fuel Economy Level.”**

14 Improving fuel economy has a number of ancillary consequences for the industry and the
15 public. The goal of EPCA, therefore, is not to achieve the maximum level of fuel economy at any
16 and all costs. Rather, NHTSA is required to balance a number of competing criteria in arriving at the
17 “maximum feasible average fuel economy level.”⁸ Among other things, NHTSA must ensure that
18 the standards: (a) do not limit the choice of cars and trucks available to consumers; (b) do not cause
19 economic hardship for the industry; (c) do not result in a significant loss of domestic employment;
20 and (d) do not result in adverse safety consequences. As the House Report on EPCA explained:

21 The Committee recognizes that the automobile industry has a central role in our
22 national economy and that any regulatory program must be carefully drafted so as to
23 require of the industry what is attainable without either imposing impossible burdens
on it or unduly limiting consumer choice as to capacity and performance of motor
vehicles.

24 H.R. Rep. No. 94-340, at 87 (1975).

25
26
27 ⁸ EPCA provides that the Secretary of Transportation is to administer the statute, and the Secretary
28 in turn assigned this responsibility to the Administrator NHTSA. 41 Fed. Reg. 25015 (1975).

1 The text of the EPCA statute provides for an average fuel economy standard for passenger
 2 automobiles of 27.5 miles per gallon. 49 U.S.C. § 32902(b). The statute further provides, however,
 3 that “the Secretary of Transportation may prescribe regulations amending the standard under
 4 subsection (b) of this section for a model year to a level that the Secretary decides is the maximum
 5 feasible average fuel economy level for that model year.” 49 U.S.C. § 32902(c).⁹ The current CAFE
 6 level for passenger cars is 27.5 mpg. 49 C.F.R. § 531.5. Similarly with respect to non-passenger
 7 automobiles, such as light trucks, the statute requires the Secretary of Transportation to set “the
 8 maximum feasible average fuel economy level that the Secretary decides the manufacturers can
 9 achieve in that model year.” 49 U.S.C. § 23902(a). NHTSA has recently adopted new final
 10 regulations overhauling the CAFE program for light duty trucks. *Average Fuel Economy Standards*
 11 *for Light Trucks: Model Years 2008-2011*, 71 Fed. Reg. 17566 (April 6, 2006).¹⁰

12 The EPCA statute requires NHTSA to set the CAFE standard while considering
 13 “technological feasibility, economic practicability, the effect of other motor vehicle standards of the
 14 Government on fuel economy, and the need of the United States to conserve energy.”¹¹ 49 U.S.C.

15
 16
 17 ⁹ The statute further provides that if the proposed revision increases the standard above 27.5 miles
 18 per gallon or decreases the standard below 26.0 miles per gallon, the revision must be submitted
 19 to Congress for approval. 49 U.S.C. § 32902(c)(2).

20 ¹⁰ The new standards provide for a transitional “Unreformed CAFE” standard applicable to all light
 21 trucks in a manufacturer’s fleet of 22.5, 23.1 and 23.5 miles per gallon for the 2008, 2009 and
 22 2010 model years, respectively. *Light Truck Standards*, 71 Fed. Reg. at 17566. The regulations
 23 then transition to a so-called “Reformed CAFE” system starting in 2011 whereby a fuel economy
 24 “target” will be calculated for each model of light truck based on the model’s “footprint,” defined
 25 as the product of the average track width (the distance between the centerline of the tires) and
 26 wheelbase (basically, the distance between the centers of the axles). *Id.* Pursuant to the formula,
 models with a smaller footprint will have a higher, more stringent, fuel economy standard, and
 models with a larger footprint will have a lower standard. *Id.* Each manufacturer’s required
 fleet-wide CAFE performance for a given model year is the production-weighted mean fuel
 economy target of all the light truck models in its fleet. *Id.* at 17607. This rulemaking is
 demonstrative of the manner in which NHTSA balances the various criteria, as discussed below.

27 ¹¹ The Defendants focus their attention exclusively on the requirement that NHTSA consider the
 28 effect of other motor vehicle standards on fuel economy. This factor, and how it relates to the
 regulations at issue here, is discussed in § III.A.2(b), below.

1 § 32902(f). Imbedded within the “technological feasibility” and “economic practicability” prongs are
2 the four criteria discussed above.

3 First, ensuring wide consumer choice is a fundamental purpose of EPCA. In fact, Congress
4 specified the fleet-wide averaging approach to “leave[] maximum flexibility to the manufacturer to
5 meet the standards” thereby “result[ing] in a more diverse product mix and wide consumer choice.”
6 S. Rep. No. 94-179 at 6 (1975). In the new Light Truck Standards, for example, NHTSA determined
7 that the “Reformed CAFE” approach “more fully respects economic conditions and consumer
8 choice” because it “does not force vehicle manufacturers to adjust fleet mix toward smaller vehicles
9 unless that is what consumers are demanding.” *Light Truck Standards*, 71 Fed. Reg. at 17570.

10 Second, NHTSA has determined that “economic practicability” means “that the investment
11 requirements are within the industry’s capability but not so stringent as to threaten economic hardship
12 for the industry as a whole.” *Passenger Automobile Average Fuel Economy Standards Model Year*
13 *1986*, 50 Fed. Reg. 40528, 40530 (Oct. 4, 1985). This criteria is related to the need to respect
14 consumer choice, and NHTSA therefore considers whether shifts in consumer demand and other
15 economic factors may make a particular fuel economy standard economically impractical for the
16 industry. For example, in 1985, NHTSA relaxed the 1986 model year (“MY”) passenger car standard
17 because a continuing decline in gasoline prices caused a shift in consumer demand away from smaller
18 cars, and therefore the only actions available to manufacturers to improve their fuel economy levels
19 would have involved product restrictions likely resulting in significant adverse economic impacts. *Id.*
20 at 40528. This action was upheld in *Public Citizen v. National Highway Traffic Safety Admin.*,
21 848 F.2d 256 (D.C. Cir. 1988); *see also Center for Auto Safety v. National Highway Traffic Safety*
22 *Admin.*, 793 F.2d 1322, 1338-40 (D.C. Cir. 1986) (“a standard with harsh economic consequences for
23 the auto industry . . . would represent an unreasonable balancing of EPCA’s policies”).

24 Third, NHTSA weighs the impact CAFE standards would have on employment in the
25 domestic automobile industry. The agency thus seeks to set fuel economy standards that are
26 “sufficiently rigorous to promote the development of more fuel efficient vehicles, but not so rigorous
27 as to result in the loss of employment in the automotive sector, then [at the time of EPCA’s
28 enactment] responsible for 1 out of every 9 jobs in the U.S. economy.” *Fuel Economy Standards--*

1 *Credits and Fines--Rights and Responsibilities of Manufacturers in the Context of Changes in*
2 *Corporate Relationships*, 69 Fed. Reg. 77663, 77667 (Dec. 28, 2004). For example, NHTSA
3 conducted a sales and employment impact analysis in the Light Truck Standards and concluded that
4 “the maximum sales loss is less than 11,000 vehicles per year for the industry,” which it concluded
5 would have only “a minor impact on employment.” *Light Truck Standards*, 71 Fed. Reg. at 17591.

6 Fourth, NHTSA has considered safety impacts in its rulemaking actions since the beginning
7 of the CAFE program. *See Passenger Automobile Average Fuel Economy Standards, Final Rule*, 42
8 Fed. Reg. 33534, 33551 (June 30, 1977). NHTSA has recognized a link between fuel economy and
9 vehicle safety in that “[t]he historical fact is . . . that carmakers respond to CAFE standards by
10 reducing the size of their fleets.” *Competitive Enterprise Inst. v. National Highway Traffic Safety*
11 *Admin.*, 956 F.2d 321, 325 (D.C. Cir. 1992). In light of the relationship between fuel economy and
12 safety, NHTSA has determined that

13 it is possible CAFE standards above 27.5 mpg could have a significant effect on
14 safety, even in the longer run, to the extent that they might “force” consumers into
15 significantly smaller and lighter cars. Thus, were NHTSA to consider setting
standards above 27.5 mpg in the future, it agrees that the issue of safety would warrant
further attention.

16 *Passenger Automobile Average Fuel Economy Standards for Model Years 1987-88*, 51 Fed. Reg.
17 35594, 35613 (Oct. 6, 1986). *See also Passenger Automobile Average Fuel Economy Standards for*
18 *Model Year 1989*, 53 Fed. Reg. 39275, 39294 (Oct. 6, 1988) (NHTSA “would closely examine the
19 safety consequences of any regulatory proposal to raise the CAFE standard if the effect of a standard
20 set too high were to force drastic mix shifts for the fleet as a whole toward very small cars.”) In its
21 recent rulemaking, NHTSA found that the Reformed Cafe approach “enhances safety by eliminating
22 the previous regulatory incentive to downsize vehicles and by raising the light truck standards so that
23 there is no regulatory incentive from the CAFE program to design small vehicles as light trucks
24 instead of passenger cars.” *Light Truck Standards*, 71 Fed. Reg. at 17568.

25 As the foregoing discussion demonstrates, Congress “specifically delegated the process of
26 setting . . . fuel economy standards [to NHTSA] with *broad* guidelines concerning the factors that the
27 agency must consider,” and it is NHTSA’s responsibility to reach “reasonable accommodation of
28 conflicting policies that were committed to the agency’s care by the statute.” *Center for Auto Safety*,

1 793 F.2d at 1338, 1341 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467
2 U.S. 837, 845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)). Over the past 30 years, NHTSA has set
3 and revised standards which it has determined meet these competing goals. *See, e.g., Light Truck*
4 *Standards*, 71 Fed. Reg. at 17569 (stating that NHTSA “balanced the express statutory factors and
5 other relevant considerations, such as safety concerns, effects on employment and the need for
6 flexibility to transition to a Reformed CAFE program that can achieve greater fuel savings in a more
7 economically efficient way” and “determined that the standards under both Unreformed CAFE and
8 Reformed CAFE represent the maximum feasible fuel economy level for each system.”)

9 **C. The AB 1493 Regulations Impose De Facto Fuel Economy Standards That Conflict With**
10 **The CAFE Standards.**

11 With this background in mind, the discussion below demonstrates that the AB 1493
12 Regulations are both “related to fuel economy standards” and conflict with the policies of EPCA.

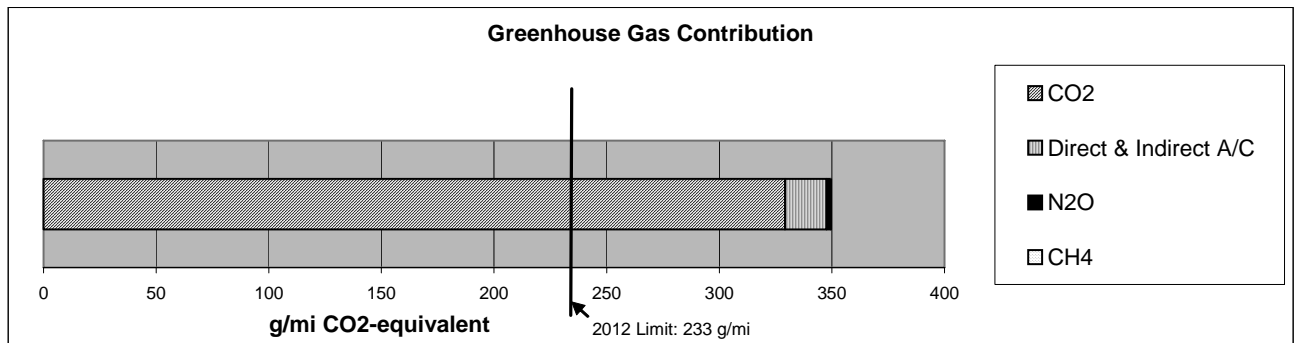
13 **1. The AB 1493 Regulations Place Limits On Emissions of Carbon Dioxide From**
14 **Motor Vehicles.**

15 Although the AB 1493 Regulations purport to address emissions other than just CO₂, as a
16 practical matter the only substantive impact is on CO₂, and it would be impossible to comply with
17 the regulations without dramatically curtailing CO₂ emissions. The emissions limits mandated by the
18 regulations are expressed in terms of grams of “carbon dioxide equivalent” emitted per mile traveled.
19 The “carbon dioxide equivalent” is determined by measuring the amount of CO₂ emitted per mile
20 driven and then adjusting it to account for the “global warming potential” of the emissions of other
21 greenhouse gases. *See* Cal. Code Regs. tit. 13, § 1961.1(a)(1)(B). The other greenhouse gases that
22 are subject to the regulation are methane (CH₄), nitrous oxide (N₂O) and hydrofluorocarbons from air
conditioning systems. *Id.*

23 Carbon dioxide is by far the most predominant of the greenhouse gases emitted from motor
24 vehicles. *See AIAM Complaint*, ¶ 36. This is demonstrated in the following table, showing CARB’s
25 estimated emission rates from a “baseline” large passenger car:
26
27
28

Greenhouse Gas Emission Rates from Large Passenger Cars ¹²		
Source	Emissions	CO2-Equivalent
CO2 Emissions (With No Air Conditioning)	329.2 g/mi	329.2 g/mi
“Indirect” CO2 Emissions (From Air Conditioning)	15.40 g/mi	15.40 g/mi
Methane Emissions	0.005 g/mi	0.12 g/mi
Nitrous Oxide Emissions	0.006 g/mi	1.78 g/mi
Direct A/C Emissions (refrigerant leakage) ¹³	0.007 g/mi	9.00 g/mi
TOTAL	344.61 g/mi	355.5 g/mi
CO2 as a Percent of Total	99.9%	96.9%

The CO2-equivalent emissions limit for the 2012 model year for the PC/LDT1 category is 233 g/mi. Thus, assuming the values above are representative of a manufacturer’s average baseline PC/LDT1 fleet, reducing all of the forms of greenhouse gas emissions other than CO2 would be insufficient to meet the standard, as depicted in the graphic below¹⁴:



The AB 1493 Regulations can be mathematically converted to a minimum fuel economy level, even if one were to account for the inclusion of the other greenhouse gases addressed in the regulations. If a manufacturer were to obtain the maximum credit estimated by CARB for direct and

¹² Source: California Environmental Protection Agency, Air Resources Board, Staff Report: Initial Statement of Reasons for Proposed Rulemaking, Public Hearing to Consider Adoption of Regulations to Control Greenhouse Gas Emissions from Motor Vehicles (“ISOR”) at 59 (Table 5.2-3); 79 (Table 5.2-14); 75 (Table 5.2-12) and 71-72 (Table 5.2-11).

¹³ The AB 1493 Regulations deal with air conditioning emissions by allowing credits to account for improvements made to reduce direct and indirect emissions. These credits could be as high as 13.0 grams per mile for the short term standards (MY 2009 through 2012) and as high as 18.5 grams per mile for the long terms standards (MY 2013 through 2016). ISOR at 110 (Table 6.1-1).

¹⁴ Thus, the Defendants’ statement that the AB 1493 standards “give each automobile manufacturer flexibility to decide the relative emphasis for reducing each of the emissions” (Defendants’ Memorandum at 5) misrepresents the impact of the regulations.

indirect emissions from air conditioning systems (13.0 g/mi for MY 2009 through 2012, and 18.5 g/mi for MY 2013 through 2016), and if it were to totally eliminate methane and nitrous oxide emissions (thus making CO₂ the only greenhouse gas emitted), the maximum allowable fleetwide level of CO₂ emissions and the corresponding fuel economy standard for a given year would be as follows:

PC/LDT1			LDT2/MDPV		
Model Year	CO ₂ Emissions Limit (in grams) ¹⁵	Corresponding Fuel economy (in miles per gallon) ¹⁶	Model Year	CO ₂ Emissions Limit (in grams)	Corresponding Fuel economy (in miles per gallon)
2009	336	27.2	2009	452	20.2
2010	314	29.1	2010	433	21.1
2011	280	32.7	2011	403	22.7
2012	246	37.2	2012	374	24.5
2013	245.5	37.3	2013	373.5	24.5
2014	240.5	38.0	2014	365.5	25.0
2015	231.5	39.5	2015	359.5	25.4
2016	223.5	40.9	2016	350.5	26.1

It is therefore immaterial that the AB 1493 Regulations “are not focused only on carbon dioxide,” as Defendants point out. *Defendants’ Memorandum* at 5. Even accounting for the maximum reduction of the other regulated substances, the regulations still place strict limits on – and require dramatic reductions in – CO₂ emissions.

¹⁵ This figure is determined by taking the CO₂-equivalent emission limit for a given model year and adding in the maximum credit for improved air conditioners. Thus, for example, the emissions limit for the 2009 model year passenger car/small light truck category is 323 g/mi. Assuming the total elimination of methane and nitrous oxide emissions, the 323 g/mi would consist entirely of CO₂. Accounting for the maximum credit for improved air conditioning of 13.0 g/mi, the effective limit on CO₂ emissions would be 336 g/mi.

¹⁶ Assuming that the combustion of a gallon of gasoline produces 9,148 grams of CO₂ (*see* § II.A, *supra*), one can convert grams of CO₂ emissions per mile to a miles per gallon standard by dividing 9,148 by the emissions limit. Thus, for example, 9,148 grams/gallon ÷ 336 grams/mile = 27.2 miles per gallon.

1 **2. The AB 1493 Regulations Mandate The Use Of Technologies That Improve Fuel**
 2 **Economy.**

3 The only way to meet these new standards is to improve fuel economy. This fact is apparent
 4 in CARB's regulatory analyses where it determined that automobile manufacturers will need to
 5 incorporate "technology packages" into their vehicles in order to meet the standards. *ISOR* at 63
 6 (Table 5.2-5). These technology packages consist of a number of so-called "Carbon Dioxide
 7 Reduction Technologies" which when used in various combinations with each other lead to varying
 8 reductions in fuel consumption and thus CO2 emissions. *Id.* at 49-69.

9 None of these Carbon Dioxide Reduction Technologies cause reductions in CO2 emissions by
 10 capturing or treating tailpipe CO2 emissions. As discussed above, that is not possible. Rather, these
 11 technologies consist primarily of improvements to the engine (such as cylinder deactivation and
 12 hybridization) and transmission (such as 6-speed automatic transmission and automatic manual
 13 transmission) that improve fuel economy. Any reduction in CO2 emissions is simply a by-product of
 14 the fact that less fuel is burned to power the vehicle. These technologies, therefore, are by and large
 15 the very same technologies NHTSA considered in determining the "maximum feasible average fuel
 16 economy level" for light trucks. *Compare ISOR at 49-69, with Light Truck Standard*, 71 Fed. Reg. at
 17 17583-585; *see also Light Truck Standard*, 71 Fed. Reg. at 17661 ("The technologies that would be
 18 employed to reduce CO2 emissions are, in all relevant ways, the same technologies as underlie
 19 NHTSA's judgment about the appropriate CAFE standards for light trucks").¹⁷

20
 21 _____
 22 ¹⁷ In fact, the fuel economy improvements mandated by the AB 1493 Regulations served as an
 23 important justification for the regulations. In determining whether the regulations would be
 24 economical to the consumer over the life cycle of the vehicles, CARB concluded that the increase
 25 in the price of motor vehicles caused by the regulations would be more than offset by a reduction
 26 in vehicle "operating costs." *See ISOR* at ix-x ("[t]he economic impact analysis is based on the
 27 staff assessment that the reduced vehicle operating cost resulting from the regulation will be
 28 sufficiently attractive to new car buyers to compensate for the vehicle price increase . . ."). The
only reduction in "operating costs" analyzed by CARB are cost savings from reduced fuel
 consumption. *See California Environmental Protection Agency, Air Resources Board, Technical*
Support Document for Staff Proposal regarding Reduction of Greenhouse Gas Emissions from
Motor Vehicles: Economic Impacts of the Climate Change Regulation at 6, 9-11.

1 The AB 1493 standards, however, require much higher fuel economy than the federal CAFE
 2 standard. CARB expects manufacturers to achieve higher fuel economy by deploying fuel saving
 3 technologies at a pace that is much more rapid than NHTSA thinks is possible. CARB's analysis
 4 assumes that car makers can revamp their vehicle fleets within four-year phase in period – *i.e.*, the
 5 period of time within which manufacturers will introduce the new technologies into their entire
 6 vehicle fleet. *See ISOR* at 2. This was the most aggressive phase-in period CARB found to be
 7 possible. *Id* at 137. NHTSA, in contrast, determined that it would not be economically practical to
 8 require manufacturers to integrate these fuel savings technologies on a time-table shorter than six
 9 years. *Light Truck Standard*, 71 Fed. Reg. at 17590 and 17626.

10 **3. In Establishing The AB 1493 Regulations, CARB Did Not Weigh The Criteria**
 11 **NHTSA Is Required To Weigh.**

12 Section 43018.5 of the California Health & Safety Code sets forth the factors CARB was
 13 required to take into account in enacting regulations to implement AB 1493. Cal. Health & Safety
 14 Code § 43018.5. The regulatory record shows that CARB did not consider factors other than those
 15 required by the state statute or other provisions of California law. *See generally ISOR*.¹⁸ These
 16 factors are different from and did not include those criteria NHTSA weighs in setting the CAFE
 17 standards that were discussed above.

18 For example, early in the rulemaking process when CARB was deciding what the form of the
 19 standard should be, it concluded that a standard that sets a uniform average grams-per-mile emissions
 20 limit applicable to all auto makers (as does the AB 1493 Regulations) “could limit the mix of future
 21 vehicle fleets” available for sale in California (*See Climate Change Regulation: Form of the Standard*
 22 at 4). There is, however, nothing in the record showing that CARB conducted any assessment of the
 23 extent to which the AB 1493 Regulations would actually impact the mix of future vehicle fleets
 24 available in California. *See generally ISOR*. In contrast, NHTSA is required to consider whether
 25 CAFE standards will impact the mix of vehicles available to consumers, as discussed above.

26 _____
 27 ¹⁸ Indeed, it is axiomatic that it would have been an abuse of its discretion had CARB considered
 28 other non-enumerated factors. *California Advocates for Nursing Home Reform v. Bonta*, 106 Cal.
 App. 4th 498, 506, 130 Cal. Rptr. 2d 823 (2003).

1 Similarly, Section 43018.5 of the Health and Safety Code required CARB to consider only the
 2 extent of employment impacts in the State of California. Cal. Health & Safety Code § 43018.5(s).
 3 CARB, therefore, did not assess whether compliance with the regulations would impact employment
 4 in the automobile industry and related fields outside of the State of California. NHTSA could not set
 5 CAFE standards without considering employment impacts throughout the nation.

6 Finally, although CARB recognized that manufacturers would have the option of lowering
 7 vehicle weight to improve CO2 emission performance, it did not rely on weight reductions in setting
 8 its standards. *ISOR* at 57. Therefore, CARB made no assessment of the impact the standards would
 9 have on vehicle safety. If NHTSA were to set CAFE standards that are as high as the fuel economy
 10 required by the AB 1493 Regulations, it would carefully consider the safety impacts of the standards.
 11 *Passenger Automobile Average Fuel Economy Standards for Model Years 1987-88*, 51 Fed. Reg.
 12 35594, 35613 (Oct. 6, 1986).

13 III. ARGUMENT

14 The discussion above demonstrates that the AB 1493 Regulations are inextricably “related to
 15 fuel economy standards” and pose a direct conflict with the policies and goals of EPCA. Under well
 16 settled law, the regulations are therefore preempted. Moreover, nothing in the Clean Air Act saves
 17 these regulations from preemption.

18 A. The AB 1493 Regulations Are Preempted By EPCA.

19 Federal law may preempt state law in three different ways. First, Congress may preempt state
 20 law by so stating in express terms. *Bank of America v. City & County of San Francisco*, 309 F.3d
 21 551, 558 (9th Cir. 2002). Second, preemption may be inferred when federal regulation in a particular
 22 field is “so pervasive as to make reasonable the inference that Congress left no room for the States to
 23 supplement it.” *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67
 24 S. Ct. 1146 (1947)). Third, preemption may be implied when state law actually conflicts with federal
 25 law. *Id.* Such a conflict arises when “compliance with both federal and state regulations is a physical
 26 impossibility,” *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210,
 27 10 L. Ed. 2d 248 (1963), or when state law “stands as an obstacle to the accomplishment and
 28

1 execution of the full purposes and objectives of Congress,” *Hines v. Davidowitz*, 312 U.S. 52, 67, 61
2 S. Ct. 399, 85 L. Ed. 581 (1941). All three of these preemption forms are at play here.

3 **1. This Court Should Defer To NHTSA’s Determination Concerning Whether**
4 **Carbon Dioxide Regulations Are Preempted By EPCA And Conflict With CAFE.**

5 The issue of the scope of EPCA’s preemption provision and whether CO2 regulations are
6 related to fuel economy standards was recently addressed by NHTSA in the new Light Truck
7 Standards. That agency concluded:

8 In mandating federal fuel economy standards under EPCA, Congress has expressly
9 preempted any state laws or regulations relating to fuel economy standards. A State
10 requirement limiting CO2 emissions is such a law or regulation because it has the
11 direct effect of regulating fuel consumption. CO2 emissions are directly linked to fuel
12 consumption because CO2 is the ultimate end product of burning gasoline. Moreover,
because there is but one pool of technologies for reducing tailpipe CO2 emissions and
increasing fuel economy available now and for the foreseeable future, regulation of
CO2 emissions and fuel consumption are inextricably linked. It is therefore NHTSA’s
conclusion that such regulation is expressly preempted.

13 A State requirement limiting CO2 emissions is also impliedly preempted under EPCA.
14 It would be inconsistent with the statutory scheme, as implemented by NHTSA, to
15 allow another governmental entity to make inconsistent judgments made about how
16 quickly and how much of that single pool of technology can and should be required to
be installed, consistent with the need to conserve energy, technological feasibility,
economic practicability, employment, vehicle safety and other relevant concerns.

17 *Light Truck Standard*, 71 Fed. Reg. at 17654.

18 It is well settled that “[a]n agency’s interpretation of the preemptive effect of its regulations is
19 entitled to deference where Congress has delegated authority to the agency, the agency’s
20 interpretation is not contrary to a statute, and agency expertise is important to determining
21 preemption.” *Indus. Truck Ass’n v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997); *Union Pacific R.*
22 *Co. v. California Public Utilities Com’n*, 346 F.3d 851, 866 (9th Cir. 2003).¹⁹ Here, NHTSA’s

23 _____
24 ¹⁹ See also *Geier v. American Honda Motor Co.*, 529 U.S. 861, 883-84, 120 S. Ct. 1913, 146
25 L. Ed.2d 914 (2000) (the Supreme Court “plac[ed] some weight upon” the Department of
26 Transportation’s determination that the airbag lawsuit before it was preempted by federal motor
27 vehicle safety standard); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 505-06, 116 S. Ct. 2240, 135 L.
28 Ed. 2d 700 (1996) (affording deference to interpretation by Food and Drug Administration
regarding the scope of preemption provision in Medical Device Amendments); *Hillsborough
County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 714-15, 105 S. Ct. 2371, 85 L. Ed. 2d 714
(1985) (finding that “[t]he FDA’s statement is dispositive on the question of implicit intent to pre-

[Footnote continued on next page]

1 interpretation of the preemptive effect of its CAFE regulations is entirely consistent with EPCA, in
 2 terms of both the policies that statute seeks to implement and the broad language of EPCA's
 3 preemption provision. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.
 4 837, 842-43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (agency "must give effect to the
 5 unambiguously expressed intent of Congress"). Moreover, this finding is based on the agency's
 6 technical expertise regarding the nature of the relationship between CO2 emissions and fuel
 7 economy. *See Light Truck Standards*, 71 Fed. Reg. at 17654-670.²⁰

8 The Defendants are wrong when they say that this discussion is "gratuitous" and "has nothing
 9 to do with the rule." *Defendants' Memorandum* at 23. In fact, this determination was indispensable
 10 to NHTSA's rulemaking for two reasons.

11 First, it is NHTSA's obligation under federal law to determine what the "maximum feasible"
 12 fuel economy level is and to set standards at that level. Allowing the State of California to effectively
 13 set a more stringent standard for light trucks would render NHTSA's rulemaking a dead letter. *Light*
 14 *Truck Standards*, 71 Fed. Reg. at 17668 (state CO2 regulations "would 'abrogate EPCA's regime,'
 15 rendering NHTSA's careful balancing of consideration[s] a nullity"). A federal agency may declare
 16 state regulation preempted in order to protect the discretionary powers conferred on it by Congress.
 17 *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54, 102 S. Ct. 3014, 73 L. Ed. 2d
 18 664 (1982); *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949 (9th Cir. 2005). NHTSA has a "special

19 _____
 20 [Footnote continued from previous page]

21 empty unless either the agency's position is inconsistent with clearly expressed congressional intent
 22 ... or subsequent developments reveal a change in that position"); *Brannan v. United Student Aid*
 23 *Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (giving substantial deference to policy decision of
 24 the Secretary of Education that regulations preempted state law); *Oklahoma Natural Gas Co. v.*
 25 *FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (*Chevron* deference applicable even to questions
 26 of agency jurisdiction and preemption of state power); *Blue Cross & Blue Shield, Inc. v. Dep't of*
Banking & Finance, 791 F.2d 1501, 1506 (11th Cir. 1986) (determination by Office of Personnel
 Management that state statute was preempted by ERISA was entitled to "great deference" if the
 determination is reasonable) (quoting *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.
 Ed. 2d 616 (1965)).

27 ²⁰ In fact, California specifically disputed NHTSA's determination on preemption in its comments
 28 to the Light Truck Standards, and NHTSA correctly rejected them. *Light Truck Standard*, 71
 Fed. Reg. at 17654-760.

1 understanding of the likely impact of both state and federal requirements, as well as an understanding
2 of whether (or the extent to which) state requirements may interfere with federal objectives.”
3 *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 506, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (Breyer, J.,
4 concurring in part and concurring in the judgment). Thus, NHTSA’s conclusion that a state
5 regulation of CO2 emissions “would irrationally limit [EPCA’s preemption] provision and leave
6 NHTSA’s role in administering the CAFE program open to a substantial risk of abrogation” (*Light*
7 *Truck Standard*, 71 Fed. Reg. at 17669) is entitled to deference.

8 Second, NHTSA had to decide the validity of the California CO2 regulations in order to fulfill
9 its obligation to consider “the effect of other motor vehicle standards of the Government on fuel
10 economy,” in setting the CAFE standard. 49 U.S.C. § 32902(f). While the Defendants recite this
11 obligation throughout their brief, they fail to recognize the absurdity of applying it in practice to state
12 regulation of CO2 emissions. Because CO2 emission limits are the functional equivalent of fuel
13 economy standards, the only way for NHTSA to have taken the AB 1493 Regulations into account in
14 the Light Truck Standards would have been for the agency to set the CAFE standards at the same
15 level as mandated by the California standard – and be able to justify it based on the other EPCA
16 criteria. Otherwise, there would be effectively two separate fuel economy regimes: the more
17 stringent standard in those states adopting the AB 1493 Regulations, and the CAFE standards
18 applicable in the rest of the country. EPCA, however, mandates just one fuel economy regime.
19 Therefore, NHTSA had to determine if the AB 1493 Regulations constituted a valid exercise of
20 California’s authority in order to decide whether it was required to take them into consideration in
21 setting the CAFE standards.

22 NHTSA is not the only federal agency that has concluded that CO2 emissions standards
23 amount to *de facto* fuel economy regulations, and therefore fall under its purview. The
24 Environmental Protection Agency – the federal agency responsible for regulating vehicular emissions
25 under the Clean Air Act – agrees. *See Control of Emissions From New Highway Vehicles and*
26 *Engines*, 68 Fed. Reg. 52922, 52925 (Sept. 8, 2003) (“Congress has not authorized the Agency to
27 regulate CO2 emissions from motor vehicles to the extent such standards would effectively regulate
28 car and light truck fuel economy, which is governed by a comprehensive statute administered by

1 DOT.”) The Defendants have provided this Court with no basis to disagree with the conclusions of
 2 these expert agencies on this issue and it should be dispositive of the question of whether CO2
 3 regulations are preempted by EPCA.

4 **2. AIAM Has Alleged Sufficient Facts To Establish It Is Entitled To Injunctive
 5 Relief**

6 Even if this Court were not to defer to NHTSA on the question of preemption, AIAM has
 7 shown that there are sufficient facts demonstrating that the AB 1493 Regulations are preempted by
 8 EPCA. This is true whether or not the Court narrowly construes EPCA’s preemption provision, as
 9 the Defendants claim it must. *Defendants’ Memorandum* at 8.²¹ Moreover, this Court should give
 10 no weight to the State’s self-serving characterization of its regulations as “emissions standards,” and
 11 not fuel economy standards. *Defendants’ Memorandum* at 18. *See Gade v. National Solid Wastes*
 12 *Management Ass’n*, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) (stating that “[i]n
 13 assessing the impact of a state law on the federal scheme, we have refused to rely solely on the
 14 legislature’s professed purpose and have looked as well to the effects of the law” and holding that
 15 state regulations concerning the handling of hazardous waste was preempted by the Occupational
 16
 17
 18

19 ²¹ The Defendants, however, are wrong on this point. There is no presumption against preemption
 20 where Congress is regulating “in an area where there has been a history of significant federal
 21 presence.” *United States v. Locke*, 529 U.S. 89, 108, 120 S. Ct. 1135, 146 L. Ed. 2d 69 (2000);
 22 *also Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 34, 347-48, 121 S. Ct. 1012, 148 L. Ed.
 23 2d 854 (2001) (no presumption against preemption because “[p]olicing fraud against federal
 24 agencies is hardly ‘a field which the States have traditionally occupied’”); *Bank of America v.*
 25 *City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (presumption against federal
 26 preemption of state law is inapplicable to federal banking regulation because of the history of
 27 federal presence in the field). Here, “because the states have not traditionally occupied the field
 28 on fuel economy regulation and fuel economy regulation has had a history of significant federal
 presence, the presumption [against preemption] is not triggered in this action.” *Cent. Valley
 Chrysler-Plymouth v. Cal. Air Res. Bd.*, No. CV-F-02-5017, 2002 U.S. Dist. LEXIS 20403 at *8-
 *9 (E.D. Cal., June 11, 2002). Moreover, it is immaterial that California has couched its
 regulations as “emissions standards” and thereby attempted to argue that they fall within the
 State’s traditional police power. *Locke*, 529 U.S. at 108-109 (no presumption against preemption
 even though state law was arguably designed to protect the health and safety of its citizens).

1 Safety and Health Act, even though the stated purpose of the regulation was to protect the public
2 from spills).²²

3 a) **Because Of The Direct And Inextricable Relationship Between CO2**
4 **Emissions And Fuel Economy, The AB 1493 Regulations Are Related To**
5 **Fuel Economy Regulations.**

6 Congress's intent to preempt broadly any and all state action in the area of fuel economy is
7 unambiguously set forth in the language of EPCA, which preempts any state law or regulation
8 "related to fuel economy standards or average fuel economy standards for automobiles." 49 U.S.C.
9 § 32919(a). "For purposes of the present case, the key phrase, obviously, is 'relat[ed] to.'" *Morales*
10 *v. Trans World Airlines, Inc.*, 504 U.S. 374, 383, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992). The
11 Supreme Court has consistently held that preemption provisions "related to" a particular field express
12 a broad pre-emptive purpose. In *Morales*, for example, the Supreme Court held that certain state air
13 travel industry guidelines governing the content and format of advertising for airline fares, frequent
14 flier miles, and compensation for overbooking were preempted by the Airline Deregulation Act. That
15 Act expressly pre-empted the states from "'enacting or enforcing any law, rule, regulation, standard,
16 or other provision having the force and effect of law relating to rates, routes, or services of any air
17 carrier . . .'" *Morales*, 504 U.S. at 383. In holding that the Act preempted the state guidelines, the
18 Court relied on the expansive phrase "relating to." "The ordinary meaning of these words is a broad
19 one – 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association
20 with or connection with' – and the words thus *express a broad pre-emptive purpose.*" *Id.* (emphasis

21
22 ²² See also *id.* at 106-107 ("it would defeat the purpose of [the preemption provision] if a state could
23 enact measures stricter than OSHA's and largely accomplished through regulation of worker
24 health and safety simply by asserting a non-occupational purpose for the legislation. Whatever
25 the purpose or purposes of the state law, pre-emption analysis cannot ignore the effect of the
26 challenged state action on the pre-empted field"); *Perez v. Campbell*, 402 U.S. 637, 651-652, 91
27 S. Ct. 1704, 29 L. Ed. 2d 233 (1971). ("We can no longer adhere to the aberrational doctrine . . .
28 that state law may frustrate the operation of federal law as long as the state legislature in passing
its law had some purpose in mind other than one of frustration"); *Aloha Airlines v. Dir. of*
Taxation, 464 U.S. 7, 13-14, 104 S. Ct. 291, 78 L. Ed. 2d 10 (1983) ("The manner in which the
state legislature has described and categorized [its law] cannot mask the fact that the purpose and
effect of the provision are to impose a levy upon the gross receipts of airlines" which was
preempted under federal law).

1 added) (quoting Black’s Law Dictionary 1158 (5th ed. 1979)). The Court analogized the “relating to”
 2 language from the Airline Deregulation Act with the preemption clause in the Employee Retirement
 3 Income Security Act of 1974 (ERISA), which pre-empts all state laws “insofar as they . . . relate to
 4 any employee benefit plan”:

5 We have said, for example, that the “breadth of [that provision’s] pre-emptive reach is
 6 apparent from [its] language,” [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-96, 77
 7 L. Ed. 2d 490, 103 S. Ct. 2890]; that *it has a “broad scope,”* *Metropolitan Life Ins.*
 8 *Co. v. Massachusetts*, 471 U.S. 724, 739, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985),
 9 and *an “expansive sweep,”* *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 95 L. Ed.
 10 2d 39, 107 S. Ct. 1549 (1987); and that it is “*broadly worded,*” *Ingersoll-Rand Co. v.*
 11 *McClendon*, 498 U.S. 133, 138, 112 L. Ed. 2d 474, 111 S. Ct. 478 (1990),
 12 “*deliberately expansive,*” *Pilot Life, supra*, at 46, and “*conspicuous for its breadth,*”
 13 [*FMC Corp. v. Holliday*, 498 U.S. 52, 58, 112 L. Ed. 2d 356, 111 S. Ct. 403 (1990)].

14 *Morales*, 504 U.S. at 383-84 (emphasis added). See also *Engine Mfrs. Ass’n v. S. Coast Air Quality*
 15 *Mgmt. Dist.*, 541 U.S. 246, 158 L. Ed. 2d 5, 124 S. Ct. 1756 (2004) (fleet rules adopted by the air
 16 quality district that prohibited the purchase or lease by various public and private fleet operators of
 17 vehicles that did not comply with stringent emission requirements were “related to” the control of
 18 emissions and were therefore preempted under the Clean Air Act).

19 The Defendants make much of the language in *New York State Conference of Blue Cross &*
 20 *Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L. Ed. 2d 695 (1995)
 21 that the phrase “related to” is not unbounded, because “[i]f ‘relate to’ were taken to extend to the
 22 furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its
 23 course, for ‘[r]eally, universally, relations stop nowhere.’” *Defendants’ Memorandum* at 18-19.
 24 Initially it should be noted that the Defendants are not correct where they say that the court in
 25 *Travelers* “rejected earlier and much broader interpretations of this term,” set forth in *Morales*.
 26 *Defendant’s Memorandum* at 18. The *Travelers* court did not even mention *Morales* let alone reject
 27 its holding – or the holdings of the litany of other cases broadly construing the “related to” language
 28 discussed above. This Court should not, therefore, assume that the Supreme Court meant to overrule
 these cases by mere implication. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S. Ct. 1997, 138 L.Ed.2d
 391 (1997) (warning that the circuit courts should not conclude that more recent Supreme Court cases
 have, by implication, overruled earlier precedents); *Columbia Union College v. Clarke*, 159 F.3d 151,

1 158 (4th Cir. 1998) (stating that lower courts should not presume the Supreme Court has overruled
 2 one of its cases by implication). In fact, the *Travelers* court specifically left untouched its prior
 3 holdings in *Ingersoll-Rand* and *Pilot Life Insurance* concerning the breadth of the “related to”
 4 language in ERISA. *Travelers*, 514 U.S. at 668.

5 Rather, the Court in *Travelers* merely restates the common-sense restriction on the “related
 6 to” language – that “pre-emption does not occur . . . if the state law has only a tenuous, remote, or
 7 peripheral connection with” the preempted field. *Travelers*, 514 U.S. at 661 (quoting *District of*
 8 *Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 130 n.1, 121 L. Ed. 2d 513, 113 S. Ct.
 9 580 (1992)); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev.*
 10 *Comm’n*, 410 F.3d 492, 502 (9th Cir. 2005) (“The issue is whether the relation is ‘indirect, remote,
 11 and tenuous’ or not.”) (quoting *Californians For Safe & Competitive Dump Truck Transp. v.*
 12 *Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998)).

13 The fundamental question here, therefore, is what is the nature of the relationship between
 14 CO2 emissions limits and fuel economy regulations? Is the relationship “indirect, remote, and
 15 tenuous,” or is it direct, inextricable and mathematical? This is a question of fact, and, as discussed
 16 above, the facts show that the relationship is direct, inextricable and mathematical. Fuel economy is
 17 “virtually synonymous with CO2 emission rates.” *Light Truck Standard*, 71 Fed. Reg. at 17660; *see*
 18 *also id.* at 17657 (“a State GHG standard is [a] fuel economy standard in almost all but name and
 19 stated purpose. It would have virtually the same effects as a fuel economy standard.”) If a
 20 manufacturer’s fleet-wide average emissions of CO2 is required to be no more than 246 grams per
 21 mile – as the PC/LDT1 fleet must under the AB 1493 Regulations by 2012 assuming full A/C credit
 22 and complete elimination of methane and nitrous oxide, *see* § II.C.1, *supra* – then that fleet must have
 23 an average fuel economy of at least 36.9 miles per gallon. A relationship cannot get any more direct
 24 than that.

25 **b) Carbon Dioxide Emissions Are Different From Other Vehicular Emissions**
 26 **And NHTSA Is Not Required To Take State CO2 Regulations Into**
 27 **Account In Setting Fuel Economy Standards.**

28 This leads to a central issue of statutory construction raised by the Defendants and *Amici*:
 How is this Court to reconcile EPCA’s broad preemption provision with the requirement that

1 NHTSA is to consider the effect of other motor vehicle standards on fuel economy in setting the
2 CAFE standards? See *Defendants' Memorandum* at 19-23; *Amici Memorandum* at 24-26.

3 The resolution to this question lies in the fundamental difference between CO2 regulations –
4 which are indistinguishable from fuel economy regulations – and other standards which only
5 indirectly and incidentally impact fuel economy. NHTSA – mindful of California's authority to
6 establish emissions regulations under the Clean Air Act and the requirement in EPCA that it take
7 such regulations into account in setting fuel economy standards – engaged in a “carefully calibrated
8 interpretation of EPCA's express preemption provision that harmonizes the two acts to the extent
9 possible.” *Light Truck Standards*, 71 Fed. Reg. at 17669. NHTSA's well-reasoned conclusion
10 reconciles the two statutes in such a way so as to avoid any conflict between their language or intent:

11 NHTSA does not interpret EPCA's express preemption provision as preempting State
12 emissions standards that only incidentally or tangentially affect fuel economy. These
13 standards include, for example, given current and foreseeable technology, the existing
14 emissions standards for CO, HC, NOX, and particulates. They also include the limits
15 on sulfur emissions that become effective in 2007. NHTSA considers such standards
16 under the decisionmaking factors provision of EPCA since, under applicable law, they
17 can be adopted and enforced and therefore can have an effect on fuel economy.

18 * * *

19 Preempted standards [on the other hand] include, for example: (1) A fuel economy
20 standard; and (2) A law or regulation that has essentially all of the effects of a fuel
21 economy standard, but is not labeled as one (example: State tailpipe CO2 standard).

22 This reading of EPCA's express preemption provision allows that provision to
23 function in a consistent way, without irrational limitation, to protect the national
24 CAFE program from interference by any State standard effectively regulating fuel
25 economy. It also simultaneously maximizes the ability of EPCA and the Clean Air Act
26 to achieve their respective purposes.

27 NHTSA's judgment is that the agency should distinguish between motor vehicle
28 emission standards for emissions other than CO2 (e.g., HC, CO, NOX and PM) and
motor vehicle emission standards for CO2. Those other emissions are not directly and
inextricably linked to fuel economy. NHTSA's current view is that standards for
emissions other than CO2 merely affect the level of CAFE that is achievable and thus
only incidentally affect fuel economy standards. Accordingly, we believe that
regulation of these emissions is not rulemaking inconsistent with the operation of
preemption principles under EPCA.

Id.

1 That is the critical distinction. Defendants and *Amici* are correct where they state that EPCA
 2 does not preempt a state or federal regulation that “has *any effect* on fuel economy.” *Amici*
 3 *Memorandum* at 21 (emphasis added).²³ But a CO2 regulation does not have just “any effect” on
 4 fuel economy. It is fuel economy. It is therefore impossible for NHTSA to merely take California’s
 5 regulations into account without completely succumbing to the fuel economy regime required by
 6 those regulations. It is for this reason that NHTSA has determined that a state regulation of CO2
 7 emissions would have the force and effect of abrogating EPCA’s regime. *Light Truck Standard*, 71
 8 Fed. Reg. at 17668. *See* § III.A.1., *supra*.

9 **c) The AB 1493 Regulations Are Also Impliedly Preempted By EPCA**

10 In addition to being expressly preempted by 49 U.S.C. § 32919(a), the AB 1493 Regulations
 11 are also impliedly preempted. There are two forms of implied preemption: field preemption and
 12 conflict preemption. “Field preemption” means that “[w]hen the federal government completely
 13 occupies a given field or an identifiable portion of it . . . , the test of preemption is whether ‘the matter
 14 on which the state asserts the right to act is in any way regulated by the federal government.’” *Public*
 15 *Utility Dist. No. 1 v. IDACORP Inc.*, 379 F.3d 641, 647 (9th Cir. 2004) (quoting *Pac. Gas & Elec.*
 16 *Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 212-13, 103 S. Ct. 1713, 75 L.
 17 Ed.2d 752 (1983)); *see also Bank of America v. City and County of San Francisco*, 309 F.3d 551, 558
 18 (9th Cir. 2002); *Sayles Hydro Ass’n v. Maughan*, 985 F.2d 451, 455 (9th Cir. 1993). For the reasons
 19 discussed in the concurrently filed brief of the Central Valley Chrysler Plaintiffs, the AB 1493
 20 Regulations are preempted because the federal government occupies the entire field of fuel economy
 21 regulations.

22 Under “conflict pre-emption,” federal law preempts a state law or regulation “that ‘under the
 23 circumstances of the particular case . . . stands as an obstacle to the accomplishment and execution of
 24 the full purposes and objectives of Congress’ -- whether that ‘obstacle’ goes by the name of

25
 26 ²³ Thus, the *reductio ad absurdum* argument advanced by *Amici* that a finding of EPCA preemption
 27 here would also mean that speed limits and gasoline taxes would also be preempted is absurd on
 28 its face. *Amici Memorandum* at 21-23. Any impact on fuel economy caused by speed limits and
 gasoline taxes would only be “indirect, remote, and tenuous” and therefore would not be
 preempted under Supreme Court precedent.

1 ‘conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation;
2 curtailment; . . . interference,’ or the like.” *Geier v. American Honda Motor Co.*, 529 U.S. 861, 873,
3 120 S. Ct. 1913, 146 L. Ed. 2d 914 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61
4 S. Ct. 399 (1941)).

5 Where Congress or a federal agency has sought to create a balanced relationship between
6 competing interests through comprehensive statutory or regulatory treatment, state law that would
7 disturb that balance is pre-empted. *See, e.g., Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd.*,
8 474 U.S. 409, 106 S. Ct. 709, 88 L. Ed.2d 732 (1986) (congressional determination to reduce federal
9 regulation to allow market forces to set price pre-empts state regulation that would upset intricate cost
10 relationships of the market); *Michigan Cannery & Freezers Ass’n, Inc. v. Agri. Mktg. & Bargaining*
11 *Bd.*, 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed.2d 399 (1984) (Agricultural Fair Practices Act pre-
12 empts state marketing statute that undermines balanced relationship Congress sought to establish
13 between agricultural producers and “handlers”); *Edgar v. MITE Corp.*, 457 U.S. 624, 102 S. Ct.
14 2629, 73 L. Ed.2d 269 (1982) (plurality opinion) (the Williams Act struck a careful balance between
15 the interests of offerors and target companies, and any state statute that “upset[s]” this balance is pre-
16 empted); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 629 (1st Cir. 1987) (state tort liability
17 preempted when enforcement would be “seriously disruptive to the congressionally calibrated
18 balance of national interests”).

19 *Geier* is particularly instructive here. In that case, the Court held that a common law action
20 claiming that an automobile maker was negligent for not installing airbags in its vehicles was
21 preempted by a Federal Motor Vehicle Safety Standard (FMVSS 208), which required auto
22 manufacturers to equip some, but not all, of their vehicles with passive restraints. The Court found
23 that the federal standard did not express a policy of “the more airbags, and the sooner, the better.”
24 *Geier*, 529 U.S. at 874. Rather, the standard was designed to “bring about a mix of different [passive
25 safety] devices introduced gradually over time; and FMVSS 208 would thereby lower costs,
26 overcome technical safety problems, encourage technological development, and win widespread
27 consumer acceptance – all of which would promote FMVSS 208’s safety objectives.” *Id.* at 875.
28 The court therefore held that a rule of tort law that required auto makers to install airbags on all of

1 their vehicles or face civil liability would stand “as an obstacle to the gradual passive restraint phase-
2 in that the federal regulation deliberately imposed.” *Id.* at 881.

3 The same is true here. EPCA does not express a policy of “the more fuel efficient vehicles,
4 and the sooner, the better.” Rather, its purpose is to reach a delicate balance between fuel economy,
5 consumer choice, economic impact on the industry, employment, and safety. Based on these criteria,
6 NHTSA determines what the “maximum feasible” fuel economy level is.

7 That the AB 1493 Regulations upset that balance is evident from the regulations themselves
8 and the rulemaking record. First, and most fundamentally, the AB 1493 Regulations require much
9 stricter fuel economy than the CAFE standards. *See* § II.C.1.

10 Second, the two regulatory approaches are different in how they classify motor vehicles and
11 calculate fuel economy. Whereas the CAFE program provides for one standard for passenger
12 automobiles and another for all light-duty trucks, the AB 1493 Regulations split the light-duty truck
13 category into two groups, and combines the smaller light-duty trucks (“LDT1s”) with passenger cars
14 and the heavier light-duty trucks (“LDT2s”) with certain heavier vehicles, called Medium Duty
15 Passenger Vehicles (“MDPVs”). Each of these two classifications are subject to a separate fleet-wide
16 average. This represents a significant difference, especially with regard to the light duty trucks.
17 NHTSA’s new “Reformed CAFE” approach for light trucks determines fuel economy based on each
18 truck model’s “footprint,” rather than setting a uniform numerical limit applicable to all light truck
19 models. NHTSA found that this approach is “a more equitable regulatory framework” and “enhances
20 overall fuel savings while providing vehicle manufacturers with the flexibility they need to respond
21 to changing market conditions.” *Light Truck Standards*, 71 Fed. Reg. at 17566. California’s regime
22 essentially throws this approach out the window.

23 Third, compliance with the AB 1493 Regulations would require manufacturers to incorporate
24 fuel saving technologies into their vehicle fleets at a pace that is faster than what NHTSA found
25 would be economically practical. NHTSA’s analysis in establishing the Light Truck Standards
26 assumed a six-year phase in period to “reduce the economic impact of applying technology by
27 providing greater flexibility as to when fuel economy improvements are expected.” *Light Truck*

28

1 *Standard*, 71 Fed. Reg. at 17590. The AB 1493 Regulations, however, would require auto makers to
2 incorporate the very same fuel reduction technologies, but within a four-year phase in period.

3 “In selecting the maximum feasible level, NHTSA strives to set the standards as high as it can
4 without causing significant adverse consequences for the manufacturers or consumers.” *Light Truck*
5 *Standard*, 71 Fed. Reg. at 17668. “The process of achieving those goals involves great expertise and
6 care.” *Id.* Thus, NHTSA has determined that any state regulation of CO2 emissions outside of the
7 CAFE program “would ‘abrogate EPCA’s regime,’ rendering NHTSA’s careful balancing of
8 consideration[s] a nullity” because the fuel economy of the cars sold in all states which have adopted
9 the AB 1493 Regulations would not be determined by the federal CAFE standard, but rather by the
10 more stringent AB 1493 standard. *Id.* (citation omitted). Because the AB 1493 Regulations conflict
11 with the federal CAFE program, they are impliedly preempted by EPCA.

12 **B. Section 209 Of The Clean Air Act Does Not Save The AB 1493 Regulations From EPCA**
13 **Preemption.**

14 Despite the facts that the AB 1493 Regulations are inextricably related to fuel economy and
15 create a direct conflict with EPCA, the Defendants and *Amici* ask this Court to hold that they are not
16 preempted by that statute because (they say) Section 209 of the Clean Air Act acts as a *quasi* savings
17 clause for the regulations. This argument is misplaced, for just as the Defendants have vastly
18 understated the scope of EPCA’s preemptive force, they have likewise overstated the extent of the
19 authority conferred on California by the Clean Air Act.

20 **1. Section 209 Of The Clean Air Act Was Not Intended To Allow California To**
21 **Address Issues Of Global Warming.**

22 Section 209 of the Clean Air Act does not give California unfettered discretion to trample all
23 over EPCA and the federal CAFE program. Rather, the text of the statute as well as the legislative
24 history evidence Congress’ intent that California regulate only in certain arenas which do not include
25 global climate change.

26 The text of Section 209 provides that California may obtain a waiver of Clean Air Act
27 preemption, *unless* EPA finds that the State “does not need such State standards to meet compelling
28

1 and extraordinary conditions” of the State. 42 U.S.C. § 7543(b).²⁴ The Defendants are asking this
 2 Court to write this limitation out of the statute, for if California were allowed to regulate CO2
 3 emissions to address issues of global climate change, then there would be no limit at all to
 4 California’s authority under Section 209.

5 But that is not what Congress intended. Rather, Congress granted California this authority to
 6 regulate automotive air pollutants because of “the *unique problems* faced by California as a result of
 7 its climate and topography,” and in particular the acute smog problem of southern California. *See*
 8 H.R. Rep. No. 728, 90th Cong., 1st Sess. (1967) (emphasis added); *see also* H.R. Rep. No. 728,
 9 *reprinted in* 1967 U.S.C.C.A.N. 1938, 1984 (statement of William B. Macomber, Assistant Secretary
 10 of State for Congressional Relations) (noting “the critical concern of California for air pollution
 11 control, which is prompted especially by the acute susceptibility of the Los Angeles basin to
 12 concentrations of smog”). California’s authority was therefore premised on the finding that “only the
 13 State of California has demonstrated compelling and extraordinary circumstances *sufficiently*
 14 *different from the Nation as a whole* to justify standards on automobile emissions which may, from
 15 time to time, need to be more stringent than national standards.” H.R. Rep. No. 728, *reprinted in*
 16 1967 U.S.C.C.A.N. 1938, 1956 (*emphasis added*); *see also id* at 1985 (statement of Reps. John E.
 17 Moss and Lionel van Deerlin) (“A look at the record should convince anyone of California’s need for
 18 this exemption [from preemption] – and of the State’s proven capabilities in the fight against smog”);
 19 *Motor Vehicle Mfrs. Ass’n of the United States v. New York State Dept. of Env’tl. Conservation*, 17
 20 F.3d 521, 526 (2d. Cir. 1994) (“Only California, because its unique Los Angeles smog problem
 21 caused it to begin regulating auto emissions ‘prior to March 30, 1966,’ enjoys a statutory exemption
 22 allowing it to promulgate its own emission standards.”)

23
 24
 25
 26 ²⁴ AIAM is not claiming that this Court should decide whether or not California’s request for a
 27 waiver of the AB 1493 Regulations should be granted, as the Defendants contend. *Defendants’*
 28 *Memorandum* at 15-16. That issue is rightly before EPA. But this Court still needs to construe
 the Clean Air Act to determine whether the authority granted to California is broad enough to
 include regulations which directly conflict with EPCA, as these regulations do.

1 This intent was reaffirmed in the Clean Air Act Amendments of 1977. Those amendments
2 changed the waiver provision slightly to provide that California may obtain a waiver if its standards
3 will be “*in the aggregate*, at least as protective of public health and welfare than applicable Federal
4 standards” – as opposed to the language in the prior version allowing for a waiver only if the
5 California standards are at least as stringent as the federal standards in all respects. Clean Air Act
6 Amendments of 1977, Pub.L. No. 95-95, § 207, 91 Stat. 755. The change was specifically to
7 accommodate California’s particular concern with oxides of nitrogen (“NOx”), which the State
8 regarded as a more serious local threat to public health and welfare (because of its role in producing
9 ozone) than carbon monoxide. Thus, California was allowed to establish more stringent NOx
10 standards but less stringent CO standards so long as the standards were “in the aggregate” at least as
11 protective as the federal standards. H.R. Rep. No. 294, 301-02 (1977), *reprinted in 1977*
12 *U.S.C.C.A.N.* 1077 at 1380-81. Again, California was granted the ability to obtain a waiver so that
13 the State could address local air pollution issues unique to California. *Ford Motor Co. v.*
14 *Environmental Protection Agency*, 606 F.2d 1293, 1294 (D.C. Cir. 1979) (the 1977 amendments were
15 to “give California more leeway to tailor its emission control program to its *particular* problems.”)
16 (emphasis added).

17 Global climate change is not a “compelling and extraordinary condition” in California. This
18 fact is demonstrated by the brief of *Amici*, which suggests that global climate change is just as
19 compelling and extraordinary in other states as it is in California – if not more so. *See e.g., Amici*
20 *Memorandum* at 6 (“Connecticut, Massachusetts, New Jersey, New York, and Rhode Island, with
21 their irregular, intense heat waves, are particularly susceptible to heat-related deaths and illnesses.”);
22 *id.* at 8 (“several amici have coastlines along the Atlantic Ocean below Cape Cod, one of the areas
23 most vulnerable to rising seas because it is low and sandy in addition to being well-developed.”).

24 Indeed, the opinion of Judge Tatel in *Massachusetts v. EPA*, on which the Defendants place
25 such reliance, discusses a number of impacts of global climate change, but does not include a single
26 mention of impacts in California. *Massachusetts v. EPA*, 415 F.3d 50, 61 (D.C. Cir. 2005) *cert.*
27 *granted* 2006 U.S. LEXIS 4910 (U.S. June 26, 2006) (Tatel, J., dissenting) (global warming “is
28 causing a host of serious problems, likely including increased flash flood potential in the

1 Appalachians, degraded water quality and reduced water supply in the Great Lakes, sea-ice melting
2 and permafrost thawing in Alaska, reduced summer snow-pack runoff in the Rockies, extreme water
3 resource fluctuations in Hawaii, and rising sea levels combined with higher storm surges along the
4 coasts of Puerto Rico, the Virgin Islands, and some eastern states.”); *see also id.* at 61 (Sentelle, J.,
5 dissenting in part and concurring in the judgment) (global warming “is harmful to humanity at large”
6 and “is not particularized [and] not specific”). Global warming is therefore clearly not the type of
7 “compelling and extraordinary” circumstance of California that Congress intended to be addressed by
8 the Section 209 waiver provision.

9 **2. Section 209 Must Be Read In Connection With Section 177 Of The Clean Air Act.**

10 The purpose and intent behind the California waiver provision of Section 209 of the Clean Air
11 Act must be read hand-in-hand with the purpose and intent behind Section 177. Section 177 provides
12 certain states the option of adopting the California motor vehicle emissions standards in lieu of
13 relying on the federal standards (the “Section 177 States”). 42 U.S.C. § 7507. Like Section 209, the
14 opt-in provision of Section 177 has limitations which demonstrate that it was intended only to address
15 local issues of ambient air quality, and not issues of global warming.

16 Section 177 is only available to States that have established “plan provisions approved [by
17 EPA] under this part [relating to nonattainment areas].” 42 U.S.C. § 7507. The “plan provisions”
18 referred to relate “state implementation plans” to reduce the air pollutants for which EPA has set a
19 National Ambient Air Quality Standard (“NAAQS”). As the legislative history of Section 177
20 demonstrates, Section 177 was intended to provide those States another tool in their efforts to
21 improve ambient air quality and meet the NAAQS. The section “would allow states *with*
22 *automotive-related air pollution problems* to adopt and enforce new car emission standards which
23 are identical to the California standards.” H.R. Rep. No. 95-294, at 14 (1977), *reprinted in* 1977
24 U.S.C.C.A.N. 1077, 1092. *See also id.* at 1292 (“Still another element of flexibility for States that is
25 afforded in this section is the authority for States with nonattainment areas for automotive pollutants
26 (other than California) to adopt and enforce California new car emission standards if adequate notice
27 is given.”); 123 Cong. Rec. H8662 (Aug. 4, 1977) (clarifying statement), *reprinted in* 1977
28 U.S.C.C.A.N. 1570, 1573 (“A key aspect of the conference agreement is the retention of the House

1 provision permitting other States than California with nonattainment areas for HC, CO, NO₂, or
 2 oxidants to adopt and enforce California's new motor vehicle emissions standards.") Thus, "[i]t was
 3 in an effort to assist those states struggling to meet federal pollution standards that Congress . . .
 4 directed in 1977 that other states could promulgate regulations requiring vehicles sold in their state to
 5 be in compliance with California's emission standards or to 'piggyback' onto California's preemption
 6 exemption." *Motor Vehicle Mfrs. Ass'n of the United States v. New York State Dept. of Env'tl.*
 7 *Conservation*, 17 F.3d 521, 527 (2d. Cir. 1994).

8 It was never the intent of Congress to allow Section 177 States to use the California emissions
 9 standards to tackle the issue of global climate change. However, once a state adopts the California
 10 emissions standard as its own, it must adopt *all* of the applicable regulations (this is the prohibition
 11 against a so-called "third vehicle"; a vehicle must meet either all California standards or all federal
 12 standards and not a hodge-podge of each). 42 U.S.C. § 7507. Congress, therefore, could not have
 13 intended for California to address a broader category of environmental concerns than it intended for
 14 the Section 177 States. Both Section 209 and 177 must be read together, and both were intended to
 15 allow the states to address the same types of issues – local ambient air quality problems such as smog
 16 and ozone. Global climate change is clearly outside of this authority.

17 **3. The Clean Air Act Amendments of 1990 Specifically Eschewed Direct Regulation**
 18 **Of CO₂ And Instead Opted For A Number Of Non-Regulatory Means For**
 19 **Addressing Issues of Global Climate Change.**

20 There is further evidence in the Clean Air Act that Congress did not intend for California to
 21 use Section 209 to address issues of global climate change. In 1990, Congress amended the Clean
 22 Air Act. A Senate committee bill first offered in 1989 in connection with these amendments included
 23 a provision specifically requiring EPA to set CO₂ emission standards for motor vehicles. S. Rep. No.
 24 101-228 at 98-100, 644, § 216 (1989). That provision was heavily criticized, in part because the
 25 impact of such regulation would be

26 to mute all laws and regulations dealing with corporate average fuel economy (CAFE).
 27 ... To meet the committee bill's CO₂ standard, in fact, cars will eventually have to
 28 attain a 40-mile per gallon fuel economy. Consequently, the CAFE standard becomes
 mute – a "deadwood" artifact of law with no consequence. The committee provision
 would have the effect of completely supplanting the current CAFE standard.

1 Senate Comm. on Environment and Public Works, S. Prt. 103-38 (statement of Senator Symms)
2 *reprinted in* IV A Legislative History of the Clean Air Act Amendments of 1990 at 5042, 5047.

3 The final version of the Senate bill did not include this provision. Instead, the 1990
4 amendments provided for other, explicitly non-regulatory, approaches to addressing the issue of CO2
5 emissions and global warming. For example, Section 103(g) of the Act references CO2 emissions
6 and provides for “nonregulatory” programs to research air pollution prevention technologies.
7 42 U.S.C. § 7403(g). Similarly, Section 602(e) of the Act requires EPA to establish the “global
8 warming potential” for a number of substances, but specifically provides that doing so “shall not be
9 construed to be the basis of any additional regulation under this Act.” 42 U.S.C. § 7671a(e). Finally,
10 an uncodified section of the amendments required EPA to promulgate regulations requiring certain
11 sources to monitor and report CO2 emissions. Pub. L. No. 101-549, 104 Stat. 2699, § 821 (1990).

12 These actions show that Congress did not intend for the Clean Air Act to address global
13 warming by controlling emissions of CO2. It would be incongruous to conclude that Congress
14 nevertheless intended for the State of California to strike out on its own to do so.

15 **4. Section 209(b) Of The Clean Air Act Does Not Abrogate EPCA’s Preemption**
16 **Provision By Mere Implication.**

17 The final and perhaps most glaring flaw in the Defendants’ and *Amici’s* argument is that they
18 are asking this Court to take the unprecedented step of holding that EPCA’s express preemption
19 provision is null and void as to these regulations on account of Section 209 of the Clean Air Act. Of
20 course, they cite no authority whatsoever for the novel proposition that an express preemption
21 provision of one statute can be wiped out – and an entire federal regulatory regime abrogated – on
22 account of another statute and by mere implication.

23 There is no exception in the text of EPCA’s preemption provision for State emissions
24 regulations that for all intents and purposes regulate fuel economy. Nor is there any provision in the
25 Clean Air Act that allows the State of California to regulate fuel economy even if the expressed
26 purpose in doing so is to control emissions. And yet the Defendants and *Amici* would have this Court
27 rewrite these two statutes to do so. The Court should decline their invitation.
28

IV. CONCLUSION

This case ultimately boils down to determining where EPCA’s preemption provision ends and California’s authority under Section 209 of the Clean Air Act begins. The only way to give effect to the express language and the Congressional intent of both of these statutes is to hold that the AB 1493 Regulations are preempted by EPCA and exceed the authority granted to California under the Clean Air Act. The Defendants’ Motion, therefore, is fundamentally flawed from a legal standpoint, and should be denied.

DATED: July 24, 2006

KIMBLE, MACMICHAEL & UPTON

By: _____ /s/ _____
Jon Wallace Upton

Attorneys for Intervenor,
Association of International Automobile Manufacturers

100035471_2.DOC