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16 **UNITED STATES DISTRICT COURT**
17 **EASTERN DISTRICT OF CALIFORNIA – FRESNO**

18 CENTRAL VALLEY CHRYSLER-JEEP,
19 INC., KITAHARA PONTIAC GMC BUICK,
20 INC., MADERA FORD MERCURY, INC.,
21 MADERA CHEVROLET, FRONTIER
22 DODGE, INC., TOM FIELDS MOTORS, INC.,
23 PISTORESI CHRYSLER DODGE JEEP, BOB
24 WILLIAMS CHEVROLET, COURTESY
25 OLDSMOBILE CADILLAC, INC., MERLE
26 STONE CHEVROLET, INC., MERLE STONE
27 PORTERVILLE, INC., STURGEON AND
28 BECK INCORPORATED, SWANSON
FAHRNEY FORD, INC., GENERAL
MOTORS CORPORATION,
DAIMLERCHRYSLER CORPORATION,
TULARE COUNTY FARM BUREAU, and the
ALLIANCE OF AUTOMOBILE
MANUFACTURERS,

Plaintiffs,

v.

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

Defendant.

Case No. CIV-F-04-6663 REC-LJO

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS OR
TRANSFER**

Hearing Date: June 13, 2005
Hearing Time: 1:30 p.m.
Courtroom: One

Honorable Robert E. Coyle

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List of Plaintiffs' Declarations Filed in Opposition to Motion to Dismiss or Transfer

1. Thomas C. Austin (Sierra Research, Inc.)
2. Bruce Beck (Sturgeon and Beck, Inc.)
3. Kelly M. Brown (Ford Motor Co.)*
4. Gregory J. Dana (Alliance of Automobile Manufacturers)
5. David Danzer (Toyota Motor Sales, U.S.A., Inc.)
6. John W. Gardner (Central Valley Automotive)*
7. Stuart H. Harden (Hemming Morse, Inc.)*
8. Leonard Harrington (Tom Fields Motors, Inc.)*
9. Reginald R. Modlin (DaimlerChrysler Corp.)*
10. Gerald R. Pistoresi (Pistoresi Chrysler-Jeep-Dodge)*
11. Michael Rosvold (Michael Cadillac, Inc.)*
12. Brian Wells (Courtesy Automotive Center)*
13. Alan R. Weverstad (General Motors Corp.)*
14. Karl-Heinz Ziwica (BMW of North America, LLC)*

* Indicates declaration lodged under seal. Redacted versions filed in the open record.

1 Plaintiffs Central Valley Chrysler-Jeep, Inc., Kitahara Pontiac GMC Buick, Inc., Madera
2 Ford Mercury, Inc., Madera Chevrolet, Frontier Dodge, Inc., Tom Fields Motors, Inc., Pistoresi
3 Chrysler Dodge Jeep, Bob Williams Chevrolet, Courtesy Oldsmobile Cadillac, Inc., Merle Stone
4 Chevrolet, Inc., Merle Stone Porterville, Inc., Sturgeon and Beck Incorporated, Swanson
5 Fahrney Ford, Inc., General Motors Corporation, DaimlerChrysler Corporation, Tulare County
6 Farm Bureau and the Alliance of Automobile Manufacturers (collectively “the plaintiffs”)
7 respectfully submit this memorandum of points and authorities in opposition to defendant’s
8 motion to dismiss or transfer this action.

9 **PRELIMINARY STATEMENT**

10 This action arises from the second attempt in three years by the California Air Resources
11 Board (“CARB”) to impose fuel economy standards for new motor vehicles. The State of
12 California has limited authority to adopt specified types of standards for smog-forming and other
13 harmful emissions from motor vehicles. The federal government regulates motor vehicle fuel
14 economy. Once federal fuel economy regulations are in place, the State has no power to set fuel
15 economy standards of its own, as this Court recognized during CARB’s last foray in fuel
16 economy regulation.¹

17 The plaintiffs in the present action include new-vehicle dealers in the Fresno area, the
18 Tulare County Farm Bureau which represents the purchasers of new motor vehicles in this area,
19 and new motor vehicle manufacturers. The defendant is the Executive Officer of CARB. The
20 regulation challenged in this action was approved by CARB at a public hearing held in Los
21 Angeles on September 23 and 24, 2004.

22 CARB based the regulation that it approved in September 2004 on a state law passed in
23 2002, Assembly Bill 1493 or “A.B. 1493.” A.B. 1493 mandates that “[n]o later than January 1,
24 2005, the state board shall develop and adopt regulations that achieve the maximum feasible and
25 cost-effective reduction of greenhouse gas emissions from motor vehicles.” (Cal. Health &

26 ¹ See *Central Valley Chrysler-Plymouth et. al v. CARB*, 2002 U.S. Dist. LEXIS 20403 (E.D.
27 Cal., June 11, 2002) (hereinafter “*Central Valley Chrysler-Plymouth*”), attached to the First
28 Amended Complaint filed Feb. 16, 2005 (“FAC”) as Exhibit B.

1 Safety Code § 43018.5(a).) There is public concern that excess emissions of greenhouse gases
2 can change global temperatures. CARB has interpreted A.B. 1493 as requiring carbon dioxide
3 standards for motor vehicles. There is no evidence that, given the nature of carbon dioxide (*see*
4 p. 7 below), CARB’s rule will have any beneficial impact on temperatures either in California or
5 globally, or on public health.² CARB’s action adopting carbon dioxide standards under A.B.
6 1493 was thus largely symbolic.

7 Carbon dioxide, which is the primary substance regulated by CARB’s new rule, is
8 produced by humans and other animals when they breathe, and is necessary to sustain plant life.
9 Carbon dioxide does not form smog or any other harmful gas. Carbon dioxide is not regulated as
10 a pollutant, like the emissions that form ozone or that are otherwise classified as harmful to
11 human health, such as carbon monoxide or particulate matter.

12 Carbon dioxide is also a natural byproduct of the combustion of any fossil fuel. It is
13 produced by gasoline-powered motor vehicles; the more gasoline a vehicle burns, the more
14 carbon dioxide it produces. Unlike smog-forming emissions and other pollutants, carbon dioxide
15 cannot be converted to another gas by means of a device like a catalytic converter. At the levels
16 of control specified in CARB’s new regulation, the only way that vehicles will be able to meet
17 CARB’s carbon dioxide requirements is by reducing their fuel consumption. By limiting the
18 amount of gasoline a vehicle can consume, using standards that control tailpipe carbon dioxide
19 emissions, the State is regulating motor vehicle fuel economy. Plaintiffs believe those carbon
20 dioxide standards are preempted by the federal fuel economy law and are unenforceable.

21 Defendant admits that “significant” questions of federal law are presented by this case.³
22 Likewise, defendant has chosen to accept for purposes of her motion to dismiss the facts pleaded
23 in the First Amended Complaint. Those facts show that CARB’s rule will increase new car and
24 truck prices in California by thousands of dollars per vehicle and imperil the survival of retail

25 _____
26 ² See FAC ¶¶ 5, 38, 111.

27 ³ See Memorandum of Points and Authorities in Support of Motion to Dismiss Plaintiffs’ First
28 Amended Complaint (hereinafter “Mem.”) at 27.

1 automotive businesses like those of the dealer plaintiffs in this action. The regulation will create
2 the equivalent of a major recession in the U.S. automobile industry.

3 Despite the high stakes presented by this case and defendant's admission that it presents
4 important questions under federal law, defendant has moved to dismiss the case or transfer the
5 litigation elsewhere. Her motion argues that (1) the federal claims presented here are not yet ripe
6 for adjudication; (2) some of the questions of statutory interpretation must be resolved by a
7 federal regulatory agency in Washington, D.C., and cannot be resolved by a federal court in
8 California; and (3) plaintiffs would in any event have no right to try their claims in Fresno.
9 Defendant's arguments have no merit.

10 ***1. Ripeness.***

11 Defendant treats this case as if it were governed by the federal Administrative Procedure
12 Act ("APA"), in which a formal and "final" rulemaking order is normally required before a
13 federal court will adjudicate the procedural or substantive validity of federal agency action. This
14 is not a federal administrative law case. The jurisdictional formalities of the federal APA are not
15 required for a suit under 42 U.S.C. § 1983 in which plaintiffs have alleged immediate adverse
16 impacts from a state regulation preempted by federal law, and in which the operation of the state
17 law against them is inevitable. (*See pp. 16-38 below.*) Indeed, candor has required defendant to
18 admit that, even under her view of the facts and the law, some parts of this case will be ripe in
19 "September [2005], at the latest." (Mem. at 34.) The preemption issues at the heart of this case
20 are as fit now as they will ever be. Defendant's admission that CARB will complete the
21 formalities in a few months warrants a case management order setting the case for cross-motions
22 for summary judgment in September or soon thereafter, not an order dismissing the lawsuit.

23 ***2. Primary administrative jurisdiction.***

24 Defendant also seeks dismissal of one specific cause of action in the First Amended
25 Complaint -- which raises issues under the federal Clean Air Act -- on the theory that a federal
26 administrative agency, the U.S. Environmental Protection Agency ("EPA"), must decide the
27 scope of federal preemption under the federal Clean Air Act. Her argument is riddled with
28 contradictions. At one point, defendant asserts that federal Clean Air Act preemption issues are

1 “specifically entrusted to the Administrator of US EPA,” Mem. at 35, but elsewhere defendant
2 reserves the putative right to regulate plaintiffs without ever seeking input or a decision from
3 EPA. *Id.* at 24 n.14, 32-33. If defendant believes she may not need to seek EPA’s approval
4 before enforcing her regulation, she cannot insist that plaintiffs await action by EPA.

5 Putting to the side defendant’s inconsistency, she has no basis for ousting this Court from
6 its jurisdiction to interpret federal law, which is its duty when presented with an issue of federal
7 preemption. No precedent supports defendant’s position on primary jurisdiction. The only court
8 of appeals to consider a similar question directly has ruled against defendant’s position. (*See pp.*
9 42-43 below.) As recently as last year, the U.S. Supreme Court exercised federal jurisdiction to
10 decide the same type of Clean Air Act preemption claims as are raised here, without any referral
11 or deference to any federal administrative agency. (*Id.* p. 42.)

12 **3. Local Rule 3-120(d).**

13 Defendant concedes that venue is proper in the Eastern District of California, and she
14 does not and cannot claim any inconvenience from litigating in Fresno. Instead, defendant
15 makes a novel claim that dealer plaintiffs in the Fresno area have no right to sue here, under
16 Local Rule 3-120(d). Defendant’s argument depends upon an antiquated interpretation of a now-
17 repealed federal venue statute that has never been applied to intra-district venue in this District,
18 and that would conflict with 28 U.S.C. § 2071(a), another Local Rule, and Fed. R. Civ. P. 83.
19 Apart from its inconsistency with the Judicial Code, the Local Rules and the Civil Rules,
20 defendant’s argument would create an array of intra-district venue requirements that would be
21 contrary to the interests of justice and defy common sense. Defendant is already litigating
22 another case involving the 2004 CARB regulation in the Superior Court for Fresno County.⁴
23 There is no reason why the plaintiffs in this case should be compelled to take their federal claims
24 elsewhere. (*See pp.* 45-55 below.)

25
26 _____
27 ⁴ *Fresno Dodge, Inc., et al v. California Air Resources Board and Catherine E. Witherspoon*,
28 Case No. 04CECG03498 (Superior Court, Fresno County, filed Dec. 7, 2004); *see* Plaintiffs’
Request for Judicial Notice (“Plaintiffs’ RJN”) Exh. 16.

1 **THE FIRST AMENDED COMPLAINT AND THE SUPPORTING EVIDENCE**

2 Defendant has moved to dismiss or transfer this action under three different provisions of
3 the Civil Rules -- Fed. R. Civ. P. 12(b)(1), (b)(3) and (b)(6). Several basic procedural points
4 should be clear at the outset. First, for motions under Rule 12(b)(6), “when ruling on a motion
5 to dismiss, [the court] accept[s] all factual allegations in the complaint as true and construe[s] the
6 pleadings in the light most favorable to the nonmoving party.” *Knievel v. ESPN*, 393 F.3d 1068,
7 1072 (9th Cir. 2005) (citing *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003)).
8 The relevant pleading for the Rule 12(b)(6) motion is therefore the First Amended Complaint,
9 filed pursuant to Fed. R. Civ. P. 15(a) on February 16, 2005.

10 Second, with respect to her motion to dismiss under Rule 12(b)(1), the case law puts
11 defendant to a choice:

12 For motions to dismiss under Rule 12(b)(1), unlike a motion under Rule 12(b)(6),
13 the moving party may submit “affidavits or any other evidence properly before
14 the court.... It then becomes necessary for the party opposing the motion to
15 present affidavits or any other evidence necessary to satisfy its burden of
16 establishing that the court, in fact, possesses subject matter jurisdiction.”
17 *Ass’n of Am. Med. Colls. v. United States*, 217 F.3d 770, 778 (9th Cir. 2000) (quoting *St. Clair v.*
18 *City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989)).

19 Defendant acknowledges her need to make an election with respect to her Rule 12(b)(1)
20 motion, and defendant states that she “brings this motion *based on the face of the pleadings*.”
21 Mem. at 10 (internal quotation omitted; emphasis added). The facts pleaded in the First
22 Amended Complaint therefore also control defendant’s jurisdictional motion. *See, e.g., Bennett*
23 *v. Spear*, 520 U.S. 154, 167-68 (1997); *see also Drier v. United States*, 95 F.3d 1435, 1439 (9th
24 Cir. 1996) (“In reviewing an order dismissing an action for lack of subject matter jurisdiction,
25 we must accept all of the plaintiff’s factual allegations as true.”) (internal quotation omitted).⁵

25 ⁵ If any of the facts pleaded in the First Amended Complaint were treated as disputable for
26 purposes of the motion under Rule 12(b)(1), an evidentiary hearing would be necessary. *See*
27 *McLachlan v. Bell*, 261 F.3d 908, 909 (9th Cir. 2001) (where “no evidentiary hearing was held,”
28 it was necessary to “accept as true the factual allegations in the complaint”); *Drier*, 95 F.3d at
1439 (on review of ruling in Rule 12(b)(1) motion, appellate court would resolve all disputes in
favor of non-movant); *see also Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation*
v. Bd. of Oil & Gas Conservation, 792 F.2d 782, 796-97 (9th Cir. 1986) (finding error in failure

1 Defendant's motion to transfer the case to Sacramento is styled as a Rule 12(b)(3) motion
2 even though such motions are directed to "improper venue," *see* Fed. R. Civ. P. 12(b)(3), and
3 even though defendant does not challenge venue in the Eastern District of California. (*See* Mem.
4 at 11 n.4.) According to one of defendant's own cases, *Carolina Cas. Co. v. Data Broad. Corp.*,
5 158 F. Supp. 2d 1044, 1047 (N.D. Cal. 2001); *see* Mem. at 11, "[i]t is not clear which party bears
6 the burden" of establishing the facts that would govern determination of a Rule 12(b)(3) motion.
7 The Ninth Circuit's decision in *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139-40 (9th
8 Cir. 2004), however, supports the acceptance of plaintiffs' allegations as true with respect to
9 venue, as well as any evidence plaintiffs put forward in support of venue. Treated as a venue
10 motion, defendant's transfer motion is not accompanied by any proof relevant to the issue.⁶

11 Nevertheless, plaintiffs are tendering a substantial body of evidence to support their right
12 to litigate in Fresno. Their evidence is summarized at pp. 11-15 below, following a brief
13 overview of the key allegations of the First Amended Complaint bearing on other parts of
14 defendant's motion.⁷ If the Court does not believe that the evidence being offered by plaintiffs

15 to conduct hearing on factual issues raised by rule 12(b)(1) motion that had been granted on
16 ripeness grounds). As for general procedures on Rule 12(b)(1) motions, *see* Wright & Miller,
17 FEDERAL PRACTICE AND PROCEDURE § 1350 (2005); *Augustine v. United States*, 704 F.2d 1074,
18 1079 (9th Cir. 1983).

19 ⁶ Defendant offers a declaration from a CARB official based in Los Angeles who estimates the
20 level of commerce in new vehicles in the Fresno area as a fraction of the entire State. *See*
21 Declaration of Robert Cross ¶ 7. That declaration, of course, does not establish that harm to
22 dealers in the Fresno area is "nominal" to each of the individual dealer plaintiffs, as defendant
23 states. (Mem. at 18 n. 8.) For the dealer plaintiffs, substantially *all* their business is in this area,
24 and the present harm to their businesses is amply supported. *See* note 20 below (declarations
25 from dealers).

26 ⁷ As is apparent from that evidence, the California rule has different impacts on different vehicle
27 manufacturers and suppliers. One plaintiff in this action, the Alliance of Automobile
28 Manufacturers, represents a broad range of manufacturers. Because the Alliance does not take
positions on competitive issues within the automobile industry, it takes no position on the
portions of the evidence offered by other plaintiffs on the competitive impacts of the California
rule. That evidence is discussed in the next two sections of this memorandum (pp. 10-15 below)
and in Part III.C of the Argument (pp. 51-55 below), at nn. 14-31 & 46-49 and accompanying
text.

1 is sufficient to carry any burden that the Court chooses to assign to plaintiffs on the transfer
2 issue, plaintiffs respectfully request an opportunity to provide evidence on the record at a
3 hearing. *See Murphy*, 362 F.3d at 1143.

4 **A. Technical and Regulatory Background**

5 The First Amended Complaint recounts the legislative and regulatory history of the rule
6 to control “greenhouse gases” approved by CARB in Los Angeles in September 2004. (*See* FAC
7 ¶¶ 68-74.) The primary greenhouse gas regulated by the CARB rule is carbon dioxide. (*See id.*
8 ¶¶ 72-74.) Because carbon dioxide disperses evenly throughout Earth’s atmosphere, it makes no
9 difference to the atmosphere or global climate whether carbon dioxide is emitted in California or
10 India or anywhere else. (*Id.* ¶ 38.) The CARB staff has estimated that emissions from all light-
11 duty vehicles in California account for less than two percent of U.S. emission of greenhouse
12 gases, and a much smaller fraction of worldwide greenhouse gas emissions. (*Id.* ¶ 5.) As the
13 First Amended Complaint states:

14 Greenhouse gas emissions in the developing world and in some industrialized
15 nations are increasing. It is beyond the power of the State of California or the
16 United States government to control those increases, and, in the absence of
17 effective and enforceable international treaties, those emissions will continue to
18 increase. Because greenhouse gases disperse evenly in the atmosphere, any rule
19 that California might adopt applicable to new motor vehicles will have no more
than a trivial effect in reducing the concentration of greenhouse gas emissions in
the upper atmosphere above California, much less the national or global
atmosphere.

20 *Id.* No witness at CARB’s hearing predicted any measurable reduction in global temperatures or
21 any reduction in California’s temperatures as a result of CARB’s regulation. (*Id.* ¶¶ 8, 11.)

22 A limitation upon how much carbon dioxide a vehicle may emit when driven one mile (or
23 any other specified distance) is functionally no different than a limitation upon how many
24 gallons of gasoline a vehicle may consume over that same distance.⁸ The direct relationship
25

26 ⁸ *See* FAC ¶ 4; *see also* Declaration of Thomas C. Austin (“Austin Decl.”) ¶¶ 22-27. Mr. Austin
27 was formerly on the staff of the U.S. Environmental Protection Agency, where he helped
28 prepare the federal fuel economy test procedures.

1 between fuel economy and carbon dioxide is reflected in federal regulations.⁹ CARB itself
2 adopted the federal fuel economy test procedure for implementation of its “greenhouse gas”
3 standards.¹⁰

4 Reducing carbon dioxide emissions at the levels mandated by CARB requires improving
5 fuel economy. EPA has explained that “[n]o technology currently exists or is under development
6 that can capture and destroy or reduce emissions of CO₂, unlike other emissions from motor
7 vehicle tailpipes. At present, the only practical way to reduce tailpipe emissions of CO₂ is to
8 improve fuel economy.” (See Notice of Denial of petition for rulemaking, *Control of Emissions*
9 *from New Highway Vehicles and Engines*, 68 Fed. Reg. 52922, 52929 (Sept. 8, 2003) and FAC
10 ¶¶ 47-51.) Likewise, an Executive Officer of CARB has previously acknowledged the direct
11 relationship between carbon dioxide and fuel economy, and the absence of any technology for
12 reducing tailpipe carbon dioxide emissions other than improving fuel economy.¹¹

13 The regulation of new motor vehicle fuel economy has been the exclusive domain of the
14 federal government for nearly 30 years. (See FAC ¶¶ 41-46.) Federal law expressly prohibits all
15 states -- including California -- from “adopt[ing]” any law or regulation “related to fuel economy

16 ⁹ The National Highway Traffic Safety Administration (“NHTSA”) establishes fuel economy
17 standards in terms of “miles per gallon.” The United States Environmental Protection Agency
18 (“EPA”) applies those standards by testing new vehicles’ “carbon dioxide grams per mile.” See,
19 e.g., 40 C.F.R. § 86.144-90(b)(4). Those tests produce a grams/mile finding with respect to
20 carbon dioxide. EPA then plugs the measured grams/mile carbon dioxide emissions into a
formula found at 40 C.F.R. § 600.113-93(e) to produce a fuel economy value expressed in
miles/gallon for comparison against NHTSA’s fuel economy standards. See FAC ¶ 45.

21 ¹⁰ Section 2.5.2.1.1 of the amended test procedures approved by CARB on September 24, 2004,
22 provides that “Greenhouse Gas emissions used for the ‘city’ CO₂-equivalent value calculation
23 shall be measured using the ‘FTP’ test cycle (40 CFR, Part 86, Subpart B), as modified in Part II
of these test procedures. Greenhouse Gas emissions used for the ‘highway’ CO₂-equivalent
24 value calculation shall be based on emissions measured using the Highway Test Procedures.”
The reference to “FTP” is the “federal test procedure,” as the citation of the Code of Federal
25 Regulations further reflects. See Plaintiffs’ RJN Exh. 3 at E-22.

26 ¹¹ See FAC ¶¶ 66 and Deposition of Michael Kenny, *Central Valley Chrysler-Plymouth v.*
27 *CARB*, No. CIV-F-02-50017, at 192:16-20, 194:8-11 (Aug. 20, 2002); Responses to Plaintiffs’
28 First Set of Requests for Admissions, *Central Valley Chrysler-Plymouth v. CARB*, No. CIV-F-
02-50017 (filed Aug. 16, 2002) (admissions Nos. 2 & 6); Plaintiffs’ RJN exhibits 4 and 5.

1 standards,” 49 U.S.C. § 32919(a). Extensive federal regulations occupy the field of fuel
2 economy regulation to the exclusion of any state law or regulation. (*See* FAC ¶¶ 47.) NHTSA
3 administers those regulations, which by Congress’s design establish *national* average fuel
4 economy standards for manufacturers. Congress deliberately did not require manufacturers to
5 meet any particular level of fuel economy in a single state, but instead ensured that
6 manufacturers are free to sell whatever vehicles customers demand in different states so long as
7 manufacturers comply with the *national* average. (*Id.* ¶¶ 75-77.)

8 Federal preemption of state motor vehicle fuel economy-related rules has been
9 sufficiently obvious for decades that virtually no State has seriously considered adopting such
10 regulations, except for California. CARB’s first attempted fuel economy regulation under the
11 guise of “carbon dioxide emission standards” was in 2001. This Court preliminarily enjoined
12 those regulations, finding that the regulations had both an unlawful “purpose” and the “practical
13 effect of regulating fuel economy.” *See Central Valley Chrysler-Plymouth, op cit.* n. 1. The
14 Court’s decision was supported on appeal by a brief of the United States Solicitor General, and
15 later in a rulemaking notice by NHTSA.¹² In its rulemaking notice, NHTSA stated as follows:

16 California has, in recent court filings, asserted that NHTSA has not treated the
17 CAFE statute as preempting state efforts to engage in CAFE related regulation ...
18 The State misses the point.... Our statute contains a broad preemption provision
19 making clear the need for a uniform, federal system ... [the United States] has a
20 substantial interest in enforcing the federal fuel economy standards and in
ensuring that states adhere to the Congressional directive prohibiting them from
adopting or enforcing any law or regulation related to fuel economy or average
fuel economy standards.

21 *Light Truck Average Fuel Economy Standards for Model Years 2005-2007*, 67 Fed. Reg. 77015,
22 77025 (Dec. 16, 2002); *see* FAC ¶ 64.

23
24
25
26 ¹² *See* FAC ¶¶ 60-67 and Plaintiffs’ RJN Ex. 15 (brief of the United States in *Central Valley*
27 *Chrysler-Plymouth*). The appeal was discontinued and the merits phase of the litigation in this
28 Court was dismissed without prejudice when CARB repealed the carbon dioxide standards that
had been challenged in the *Central Valley Chrysler-Plymouth* litigation. *Id.* ¶¶ 67.

1 **B. Impacts of the 2004 Regulation**

2 The new regulation adopted by CARB in September 2004 is a far more comprehensive
3 and extreme intrusion by CARB into the federal field of fuel economy regulation than CARB’s
4 previous attempt at fuel economy regulation familiar to the Court from the *Central Valley*
5 *Chrysler-Plymouth* litigation. The rule involved in the *Central Valley Chrysler-Plymouth* case
6 required an increase in fuel economy for a limited part of the new-vehicle product line. The rule
7 approved by CARB last September requires the vast majority of new cars and trucks sold in
8 California “to attain substantially higher fuel economy than required by federal regulation.” (*See*
9 *FAC* ¶ 77.) Vehicle manufacturers have to plan their product lines and make investments in new
10 vehicles many years in advance of a given model year.¹³ If the automobile industry follows
11 CARB’s intent, and attempts to comply with the new rule using various technologies discussed
12 during CARB’s 2004 rulemaking, the industry’s investment of capital and engineering resources
13 prior to the start of model year 2009 will exceed \$2.5 billion.¹⁴

14 In addition to requiring heavy investment before the start of the 2009 model year,
15 CARB’s requirements for passenger cars are so stringent that some manufacturers will have only
16 a limited number of new passenger car models to sell in California or in any other state that
17 chooses to adopt the California rules, as the CARB rule escalates in stringency.¹⁵ The affected
18 manufacturers have alerted investors to the potential adverse effects of CARB’s standards if
19 those standards were to withstand legal challenge. Those projected impacts include “substantial
20

21 ¹³ *See* Declaration of Kelly M. Brown (Ford Motor Co., hereinafter “Brown Decl.”) ¶¶ 3-6;
22 Declaration of David Danzer (Toyota Motor Sales, U.S.A., Inc.) ¶¶ 4-6; Declaration of Reginald
23 R. Modlin (DaimlerChrysler Corp., hereinafter “Modlin Decl.”) ¶¶ 23-30; Declaration of Alan R.
24 Weverstad (General Motors Corp., hereinafter “Weverstad Decl.”) ¶ 7; Declaration of Karl-
25 Hanz Ziwica (BMW of North America) ¶ 14.

26 ¹⁴ *See* Austin Decl. ¶ 50.

27 ¹⁵ *See* Modlin Decl. ¶ 48 (predicting specific percentages of lost sales in California for
28 DaimlerChrysler); Weverstad ¶¶ 42, 44 (same, with respect to GM); *see also* Brown Decl ¶ 15
(Ford’s product planning is not yet complete but Ford is likely to have to restrict product
offerings).

1 adverse effects on our sales volume and profits,”¹⁶ “severely restrict[ed] product offerings or
2 close[d] plants,”¹⁷ and “significantly restrict[ed] products.”¹⁸ The loss of a full line of
3 passenger cars and trucks also has a serious impact on the competitive position and goodwill of
4 many dealers in the Fresno area, including some of the dealer plaintiffs in this action. (*See* pp.
5 13-15 below.)

6 Against that backdrop, the First Amended Complaint outlines the steps that vehicle
7 manufacturers must undertake immediately in order to try to comply with the CARB regulation
8 by producing vehicles with new technology. Those facts establish why the manufacturers need
9 immediate pre-enforcement review of the CARB regulation. (*See* FAC ¶¶ 75-84, 97-107.)
10 Defendant has not elected to contest those allegations in her motion to dismiss, and they are
11 more than sufficient to establish the need for the Court to exercise its jurisdiction here. (*See* p. 5
12 above *and* 37-38 below.)

13 In support of her “venue” motion, however, defendant apparently believes that she can
14 challenge the facts concerning the impact of the CARB rule on the plaintiffs who are based in the
15 Fresno area, and more particularly the dealer plaintiffs, whose interests she tries to belittle.
16 Defendant’s main claim with respect to the dealers is that “[a]ny effects on [the dealers] will not
17 possibly occur until model year 2009 motor vehicles are sold.”¹⁹ That speculation is
18 unsupported by any evidence. As stated in the First Amended Complaint, “Dealers who depend
19 on either ‘work trucks’ or full-size, value-priced family sedans for a substantial part of their
20 livelihood will no longer remain viable ... without drastic changes in their businesses.”
21 (FAC ¶ 84.)

22 ¹⁶ Ford Motor Company, Form 10-K (March 10, 2005), at 18; Plaintiffs’ RJN Exh. 12.

23 ¹⁷ General Motors Corporation, Form 10-K (March 16, 2005), at I-4; Plaintiffs’ RJN Exh. 13.

24 ¹⁸ DaimlerChrysler Corporation, Form 20-F (filed Feb. 28, 2005), at 33, Plaintiffs’ RJN Exh. 14.

25 ¹⁹ *See* Mem. at 31; *see also id.* at 18 n.8 (“The Court should not give very much weight, if any,
26 to the presence of the local car dealers plaintiffs and plaintiff Tulare County Farm Bureau,
27 because they are at most nominal plaintiffs ... It is not these Plaintiffs, but rather the
28 manufacturer plaintiffs who will be most affected by these proposed regulatory amendments,
who face any alleged hardship in the immediate future.”).

1 The arguments of defendant’s counsel are entitled to no weight in contradicting the facts
2 as pleaded in the First Amended Complaint. Nevertheless, the dealer plaintiffs in this action are
3 tendering evidence to support their right to litigate in this Court. That evidence is contained in
4 several declarations from dealers, two independent experts, and manufacturers who supply the
5 dealer plaintiffs.²⁰ That evidence demonstrates the following:

6 • In the automobile industry, the long lead times needed to plan for future model years
7 mean that some manufacturers can already predict the need for significant changes in their
8 product lines, well into the future.²¹ For some manufacturers the CARB rule sets standards for
9 carbon dioxide that cannot be met with primary reliance on vehicles equipped with gasoline-
10 powered engines. Those manufacturers will need to convert more than half of their California
11 product lines to so-called “hybrid” vehicles -- *i.e.*, vehicles that use both a gasoline engine and
12 an electric motor for propulsion. According to some manufacturers hybrid technology will
13 sharply increase the prices of those manufacturers’ new vehicles and reduce dealers’ sales.²²

14
15 ²⁰ See note 15 above. The reasons for the product line restrictions are discussed in the
16 competitive impact analysis contained in the declaration from Mr. Austin, an independent expert
17 who has studied the costs and likely impacts of the CARB rule. See Austin Decl. ¶¶ 35-40. The
18 specific financial impact of the product line restrictions caused by the California regulation on
19 dealers in this area is quantified by Mr. Stuart Hardin, who is an independent expert on dealer
20 finance and related issues, who in other unrelated matters has been an expert for the State of
21 California. See Declaration of Stuart Hardin (“Hardin Decl.”) ¶¶ 2, 3, 7, 10. Six dealers have
22 also filed declarations describing the impact of the California rule on their businesses. See
23 Declarations of Bruce Beck (part owner of Sturgeon & Beck, Inc., hereinafter “Beck Decl.”);
24 John W. Gardner (president of Central Valley Chrysler Automotive, hereinafter “Gardner
25 Decl.”); Leonard Harrington (owner of Tom Fields Motors, Inc, hereinafter “Harrington Decl.”);
26 Gerald R. Pistoresi (part owner of Pistoresi Chrysler-Dodge-Jeep, hereinafter “Pistoresi Decl.”);
27 Declaration of Michael Rosvold (owner of Michael Cadillac, Inc., hereinafter “Rosvold Decl.”);
28 and Declaration of Brian Wells (part owner of Courtesy Automotive Center, hereinafter “Wells
Decl.”); *and* notes 22, 25-27 and 46 below.

²¹ See FAC ¶¶ 99 *and* note 15 above.

²² For manufacturers’ estimates of the costs of hybrid technology that will affect vehicle prices,
see Modlin Decl. ¶ 41 *and* Weverstad Decl. ¶ 40. For the impact of higher prices on the demand
for and sales of new vehicles, *see* Beck Decl. ¶ 7; Gardner Decl. ¶ 4; Harrington Decl. ¶¶ 3, 7;
Pistoresi Decl. ¶¶ 6, 9-10; Rosvold Decl. ¶ 7; Wells Decl. ¶ 3, 11-12.

1 The cost of the hybrid systems will simply be too high in order for some manufacturers to
2 compete in all segments of the California new-vehicle market, and those manufacturers and their
3 independent dealers will have only limited product lines to sell.²³ This inevitable consequence
4 of the CARB rule identified by some manufacturers for their product lines is explained in the
5 declaration of an independent expert, who is a former Executive Officer of CARB.²⁴

6 • The loss of a full line of passenger cars and trucks will have a serious impact on the
7 competitive position and goodwill of many dealers in the Fresno area, including some of the
8 dealer plaintiffs in this action who have filed declarations opposing the dismissal or transfer of
9 this action.²⁵ The dealers who will be particularly affected are those whose customers want full-
10 size, value-priced cars and trucks, particularly for farm or ranch use. (*See* FAC ¶ 14.) If those
11 vehicles are not available, some of their customers will instead buy used vehicles; others will go
12 to dealerships less severely affected by this regulation; and other customers will simply keep
13
14
15

16 ²³ *See* FAC ¶ 31, note 15 above, and Austin Decl. ¶¶ 10, 35-40.

17 ²⁴ *See* Austin Decl. ¶¶ 39-40. As Mr. Austin explains, the cost differences faced by some
18 manufacturers included in his analysis exceed the average profits per vehicle that those
19 manufacturers can obtain. That conclusion holds even if one uses cost estimates for hybrids
20 developed by the CARB staff. *See id.*, App. B at 32-33. The affected manufacturers “will be at
21 such a severe competitive disadvantage under the CARB regulation that they will be forced to
22 severely limit sales of passenger cars” and some truck models. *Id.* ¶ 10.

23 ²⁵ *See* Beck Decl. ¶ 9 (“Without a full lineup of vehicle models to sell, my dealership will have
24 greatly reduced vehicle sales”); Gardner Decl. ¶ 8 (“In order to maintain our customer base, it is
25 critical that we offer new models for a given nameplate every few years.”); Harrington Decl. ¶ 6
26 (due to model restrictions caused by the regulation, “the goodwill and customer base that
27 Turlock Auto Plaza has built up as a seller of DaimlerChrysler vehicles will be lost. This will
28 have a devastating impact on Turlock Auto Plaza’s revenues.”); Rosvold Decl. ¶ 5 (dealer will
lose repeat customers if sales of specific nameplates drop).

1 their old vehicles longer.²⁶ Prices and costs are very important in the Fresno market, where
2 consumers have relatively low disposable income compared to other parts of California.²⁷

3 Nevertheless, defendant tries to claim that the adverse impacts of the CARB rule on the
4 local automobile retail market are years away.²⁸ Defendant apparently assumes that the current
5 value of a retail business as a going concern does not depend on its long-term ability to stay in
6 business with at least its current level of revenue. Such a view of the economics of the retail
7 automobile business is wrong, and is rebutted by the declaration of an expert who has evaluated
8 the impact of losses in future sales caused by regulation on the current value of some of the
9 dealer plaintiffs.²⁹

10 Like any other business of comparable size, an automobile dealership that currently sells
11 a full range of products and will continue such sales in the foreseeable future is worth much
12 more to a present purchaser of that business than if its sales are reduced to a limited product line,
13 with fewer options and lower revenues. The expert who studied the impact of the California rule
14 on new-vehicle dealers in the Fresno area estimates that the current value of the businesses that
15 he has studied has declined significantly. The current loss in value depends on the size and type
16 of each dealer's business, and ranges from at least \$140,000 to more than \$1.7 million.³⁰ Those

18 ²⁶ See FAC ¶¶ 10-12 and Wells Decl. ¶ 3 (price is critical in determining whether to buy a new
19 vehicle); Pistoresi Decl. ¶¶ 6, 9 (customers shop among different dealers based on price, and
20 DaimlerChrysler has advised that its price increases will not affect all manufacturers).

21 ²⁷ See FAC ¶¶ 12-13; see also Beck Decl. ¶ 4 (customer profile includes buyers "who are just
22 entering the workforce and need basic reliable transportation," as well as buyers who need a
vehicle for farming and well as personal transportation).

23 ²⁸ See Mem. at 31 ("Any effects on these [dealer] Plaintiffs will not possibly occur until model
24 year 2009 motor vehicles are sold. Any hardship justifying bringing this action now is only
applicable to the manufacturer plaintiffs.").

25 ²⁹ See Harden Decl. ¶¶ 3-11.

26 ³⁰ See Harden Decl. ¶ 7. The average current loss in value for the four dealerships who were the
27 primary focus of Mr. Harden's study is more than \$650,000, and excluding the firm with the
28 highest losses the average of the other three was more than \$300,000.

1 current losses in value for those businesses are conservative estimates, which do not take account
2 of all the adverse effects of the California rule on automotive retailing in this area.³¹

3 Contrary to defendant’s naive view of the business of an automobile dealership, the
4 dealer plaintiffs therefore are not “nominal” plaintiffs with only future harm. (*See* Mem. at 18
5 n.8.) They have already been injured by this regulation because the rule has devalued their
6 businesses, by severely reducing the future availability of full-size, value-priced vehicles. The
7 dealer plaintiffs need at least as early a determination of the merits of this case as their
8 manufacturer suppliers, and as explained below, they have a right to have their claims heard in
9 this courthouse. (*See* pp. 51-55 below.)

10 ARGUMENT

11 Defendant’s efforts to avoid the merits, or alternatively to move the lawsuit out of
12 Fresno, have no legal merit. Defendant makes only a perfunctory challenge to the existence of a
13 sufficient “case or controversy” under Article III of the Constitution to establish this Court’s
14 subject-matter jurisdiction. Her challenge based on prudential ripeness finds no support in cases
15 that, like this one, involve legal preemption issues, when the operation of the challenged state
16 requirement is inevitable and plaintiffs face severe hardship if adjudication is delayed. Indeed,
17 defendant’s concession that this case will be ripe in September is a frank admission that CARB’s
18 fuel economy regulation is inevitable and that ministerial tasks between now and September are
19 substantively irrelevant.

20 In addition, this case is properly in this Court. It is the business of federal courts to apply
21 the law to preemption cases brought under 42 U.S.C. § 1983, and there is no basis for a referral
22 to U.S. EPA. (*See* pp. 38-45 below.) Defendant’s objection to litigation in Fresno is not based
23 on inconvenience. Her grounds for seeking transfer would lead to a result inconsistent with
24 common sense and with the statutes and rules that govern the use of Local Rules in this District
25 and elsewhere. (*See* pp. 45-55 below.)

26 _____
27 ³¹ *See* Harden Decl. ¶ 9 (“The estimated impact on values should be considered a minimum
28 impact.”)

1 **I. THE PARTIES SHOULD PROCEED WITH THE MERITS BECAUSE**
2 **PLAINTIFFS' CLAIMS ARE RIPE FOR ADJUDICATION.**

3 This case meets the requirements for Article III jurisdiction. To satisfy Article III's
4 threshold standing requirement at the pleading stage, plaintiffs must allege three things: [1] an
5 injury-in-fact that is [2] traceable to the challenged action and [3] redressable by a favorable
6 judicial decision. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citing *Lujan v. Defenders of*
7 *Wildlife*, 504 U.S. 555, 560-61 (1992)).

8 The First Amended Complaint satisfies those minimal pleading requirements. It alleges
9 (among other cognizable injuries) that CARB's adoption of the greenhouse gas regulation will
10 force manufacturers to undertake massive current expenditures and alter longstanding business
11 plans, and that the rule has reduced the value of dealers' businesses and jeopardized their long-
12 term financial health. (*See* FAC ¶¶ 75-86, 97-107.) Those injuries would be redressed if this
13 Court invalidates or enjoins CARB's regulation. Nothing more is required. *See, e.g., Bennett*,
14 520 U.S. at 168. Defendant mentions the constitutional components of ripeness only in passing,
15 Mem. at 20, 23 n.11. Because the inquiries for Article III standing and the constitutional
16 components of ripeness are "the same," *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088,
17 1094 n.2 (9th Cir. 2003), and plaintiffs clearly possess Article III standing, defendant's ripeness
18 arguments are, at bottom, "prudential" in nature.

19 Prudential ripeness is "guided by two considerations: the fitness of the issues for judicial
20 decision and the hardship to parties of withholding court consideration." *Maldonado v. Harris*,
21 370 F.3d 945, 954 (9th Cir. 2004) (internal quotation omitted); *see generally Regional Rail*
22 *Reorganization Act Cases* ("RRR Cases"), 419 U.S. 102, 138-43 (1974); *Abbott Labs. v.*
23 *Gardner*, 387 U.S. 136, 149 (1967). Fitness of the issues and hardship to the parties are
24 balanced against each other, such that a strong showing with respect to one can compensate for a
25 relatively weaker showing with respect to another.³² Defendant's insistence that completion of

26 ³² *See Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409, 1414 (9th
27 Cir. 1992); *see also Stern v. U.S. Dist. Court*, 214 F.3d 4, 10 (1st Cir. 2000) ("[A] very strong
28 showing on one axis may compensate for a relatively weak showing on the other."); *Neb. Pub.*
Power Dist. v. MidAm. Energy Co., 234 F.3d 1032, 1039 (8th Cir. 2000) ("[T]he two ripeness
branches must operate on a sliding scale"); Laurence H. Tribe, *Am. Constitutional Law* § 3-10, at

1 every last state ministerial task is “a fundamental requirement for [a] case to be ripe,” (Mem. 19),
2 misconstrues Ninth Circuit precedent and the nature of plaintiffs’ claims. (See pp. 24-30 below.)
3 Applying the settled principles of the prudential ripeness doctrine, this case is ripe for review.

4 **A. This Case Is Fit For Review Because The Issues Presented Are Purely Legal**
5 **And CARB Has Taken Its Final Substantive Action To Adopt Its Fuel**
6 **Economy Standards.**

7 Where the issues presented are predominantly legal and the allegedly illegal result of the
8 agency action is inevitable, the issues are “fit for review” under the first prong of the prudential
9 ripeness inquiry. See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev.*
10 *Comm’n (“PG&E”),* 461 U.S. 190, 201 (1983); *Buckley v. Valeo,* 424 U.S. 1, 116-17 (1976);
11 *RRR Cases,* 419 U.S. at 140-43; *Union Pac. RR. Co. v. Cal. Pub. Utils. Comm’n,* 346 F.3d 851,
12 871-72 & n.22 (9th Cir. 2003); *City of Auburn v. Qwest Corp.,* 260 F.3d 1160, 1172 (9th Cir.
13 2001). The First Amended Complaint meets those criteria and its claims are fit for adjudication.

14 **1. The First Amended Complaint Raises Purely Legal Issues**
15 **Regarding CARB’s Rule Under Federal Preemption Statutes.**

16 For at least two decades, the Supreme Court has made clear that Supremacy Clause
17 challenges to industry-wide standards are predominantly legal in nature and are fit for judicial
18 action without awaiting agency enforcement. *PG&E,* 461 U.S. at 201 (“The question of pre-
19 emption is predominantly legal, and although it would be useful to have the benefit of [the
20 state’s interpretation and application of the law], resolution of the pre-emption issue need not
21 await that development.”). The Ninth Circuit has a long line of precedent reiterating that basic
22 rule. See, e.g., *City of Auburn,* 260 F.3d at 1172 (“[This case] presents a pure question of law:
23 Are the [local] ordinances preempted by state or federal law? No further factual record would

24 80 (2d ed. 1988) (“Cases in which early legal challenges are held to be ripe normally present
25 either or both of two features: significant present injuries produced by contemplation of a future
26 event; *or* legal questions that do not depend for their resolution on an extensive factual
27 background.”) (emphasis added). Thus, “[w]hether an issue is ripe for judicial determination
28 depends on the *combined weight* of the question’s fitness for adjudication and the hardship to
the parties if review is delayed.” *Friedman Bros. Inv. Co. v. Lewis,* 676 F.2d 1317, 1319 (9th
Cir. 1982) (emphasis added).

1 narrow or clarify that issue.”) (citation omitted); *Haw. Newspaper Agency v. Bronster*, 103 F.3d
2 742, 746 (9th Cir. 1996) (“[T]he issue of whether a federal law ‘occupies the field’ and thereby
3 preempts state law is ‘purely legal.’”) (quoting *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451,
4 454 (9th Cir. 1993)); *Hotel Employees & Rest. Employees Int’l Union v. Wilhelm*, 984 F.2d
5 1507, 1513 (9th Cir. 1993) (“Preemption is predominantly a legal question, resolution of which
6 would not be aided greatly by development of a more complete factual record.”).

7 Contrary to defendant’s claim, *see* Mem. at 28, the same rule applies to cases arising
8 under the Dormant Commerce Clause. *See, e.g., Union Pacific*, 346 F.3d at 871-72 & n.22
9 (holding that a Dormant Commerce Clause challenge to regulatory standards that had not yet
10 been developed was ripe for review because any standard adopted would impose a
11 disproportionate burden on interstate commerce); *Gary D. Peake Excavating Inc. v. Town Bd. of*
12 *Hancock*, 93 F.3d 68, 72 (2d Cir. 1996) (holding in a Dormant Commerce Clause case that “[t]he
13 issues presented by the Plaintiffs’ claims are fit for judicial review because they are purely legal
14 and may be decided without further factual development”).

15 **2. CARB Has Adopted Fuel Economy Standards, And None Of**
16 **The Ministerial Tasks Defendant Identifies Undermine The**
17 **Fitness of Plaintiffs’ Claims under Federal Law For Review**

18 Defendant describes in detail various bureaucratic steps within California administrative
19 practice that, contrary to the requirements of CARB’s enabling statute, were not completed by
20 the end of 2004, if defendant is to be believed. *See* Mem. at 22-23; *but see* Cal. Health & Safety
21 Code § 43018.5(a) (setting deadline of January 1, 2005, for the “adopt[ion]” of greenhouse gas
22 standards). Defendant tries to present the remaining ministerial tasks as a basis to defeat federal
23 jurisdiction. But she never suggests that CARB’s September 2004 action approving the
24 greenhouse gas rules was not the “definitive statement of [the] agency’s position” on the issues
25 of federal law presented in this case. *Am. Med. Colls.*, 217 F.3d at 780. The issues presented
26 here will be no better defined once those steps are completed -- which she appears to promise
27 will be fulfilled in a few months -- than they are now. *See RRR Cases*, 419 U.S. at 145 (federal
28 jurisdiction should be exercised if “we will be in no better position later than we are now” to

1 decide the merits); *MidAm. Energy*, 234 F.3d at 1039 (rejecting ripeness challenge where
2 requested delay of three years would produce “nary a scintilla of additional relevant evidence”).

3 In trying to suggest that implementation of the greenhouse gas rule is not inevitable, the
4 best defendant can muster is this empty hypothetical: “If the process stopped right now, for any
5 reason, the challenged proposed regulatory amendments would not impose any obligations on
6 anyone.” Mem. at 23. That hypothetical is conspicuously silent as to the *likelihood* that any
7 such contingency might render judicial review unnecessary. A serious prudential objection
8 would need, at a minimum, to raise a serious likelihood that there will be no fuel economy
9 standards imposed upon plaintiffs, which might mean that plaintiffs’ injuries are only
10 “imaginary” or “speculative.” *City of Auburn*, 260 F.3d at 1171 (internal quotation omitted).
11 Such arguments, in order to overcome the allegations in the complaint and prevail, should be
12 supported by evidence, *Am. Med. Colls.*, 217 F.3d at 778, and defendant is surely in the best
13 position to inform this Court whether, unbeknownst to plaintiffs and the public, CARB will not
14 be implementing fuel economy standards.

15 Three things are certain: (1) CARB had a legal duty to “adopt” greenhouse gas standards
16 by January 1, 2005; (2) CARB’s pronouncements before, during and after the Board’s September
17 24, 2004 vote characterize the Board’s vote as an “adoption” of greenhouse gas standards (*i.e.*,
18 an “adoption” of preempted fuel economy standards); (3) whatever bureaucratic tasks remain,
19 none of them stands in the way of fuel economy regulation, which plaintiffs challenge as
20 unlawful. A brief review of the administrative process to date confirms this.

21 1. As an initial matter, CARB had a legal requirement to “adopt” greenhouse gas
22 emission standards by January 1, 2005. State law expressly commands: “No later than January
23 1, 2005, the state board [*i.e.*, CARB] shall develop *and adopt* regulations that achieve the
24 maximum feasible and cost-effective reduction of greenhouse gas emissions from motor
25 vehicles.” (Cal. Health & Safety Code § 43018.5(a) (emphasis added).) CARB staff issued its
26 “Initial Statement of Reasons” in support of the regulation on August 6, 2004, and then issued an
27 “Addendum” in advance of the Board’s September 23-24 hearing so that the Board could adopt
28

1 the greenhouse gas standards based upon that record, which is precisely what the Board did. No
2 further Board action was contemplated by CARB and none is scheduled.³³

3 2. During the Board hearing, Board members stated that they were taking
4 substantive action to meet what they considered a statutory mandate. For example, CARB’s
5 then-chairman Alan Lloyd justified the Board’s action by reference to the underlying duties of
6 state law. Referring to the author of the State law, Assemblywomen Pavley, Dr. Lloyd stated,
7 “Fran Pavley . . . set the target for us so we didn’t have much leeway. We were required by that
8 legislation to act.” Sept. 24, 2004 CARB Hearing Tr. at 119; Plaintiffs’ RJN Exh. 1 at 119.
9 Similarly, Board members expressed no view that their actions were tentative, interim or subject
10 to receiving further input from the CARB staff. Board member D’Adamo likewise stated: “This
11 regulation is – it’s not even a close call for me personally. . . . The Legislature has given us a
12 mandate to act.” *Id.* at 129-30.

13 3. At the conclusion of the hearing on September 24, 2004, the Board voted
14 unanimously to adopt Resolution 04-28, which included a mandate for regulation and findings in
15 support of that mandate. Resolution 04-28 is replete with the language of “adoption.” At the
16 outset, the Resolution recognizes the Board’s duty under state law: “WHEREAS, paragraph
17 43018.5(a) of the Health and Safety Code *requires* the Board, no later than January 1, 2005, to
18 develop and *adopt* regulations that achieve the maximum feasible and cost-effective reduction of
19 greenhouse gas emissions – another type of pollutant or contaminant – from motor vehicles.”
20 (*See* FAC Exhibit A at 3 (emphasis added).) The Board then makes a litany of findings in
21 support of the greenhouse gas standards (*i.e.*, fuel economy standards) “based on its review of all
22 information in the record for this rulemaking.” (*Id.* at 8-14) The Board then concludes by
23 directing the Executive Office to carry out its substantive decision with respect to regulatory
24 amendments adopting greenhouse gas standards: “[T]he Board directs the Executive Officer to
25 compile *the adoption and amendments described above*, in accordance with the Board’s

26
27 ³³ *See* Declaration of Gregory J. Dana in Opposition to Defendant’s Motion to Dismiss or
28 Transfer (filed May 2, 2005) (“Dana Decl.”) at ¶¶ 6-8.

1 direction.” (*Id.* at 14 (emphasis added).) The Board then makes an obligatory determination that
2 its new standards are not less protective than federal law: “BE IT FURTHER RESOLVED that
3 the Board hereby determines that *the regulations approved herein* will not cause California
4 motor vehicle emission standards, in the aggregate, to be less protective of public health and
5 welfare than applicable federal standards.” (*Id.* at 15 (emphasis added).)

6 4. Once Resolution 04-28 was adopted, CARB then alerted the public to its actions
7 as follows:

8 The California Air Resources Board (ARB) today *approved* a
9 landmark regulation that requires automakers to begin selling
10 vehicles with reduced greenhouse gas emissions by model year
11 2009. . . . The regulation, which the ARB *adopted* after a
12 marathon public hearing, . . . sets limits on the amount of
greenhouse gas emissions that can be released from new passenger
cars, SUVs and pickup trucks sold in California.

13 CARB, *News Release: ARB Approves Greenhouse Gas Rule*, Sept. 24, 2004 (emphasis added).³⁴

14 On October 19, 2004, CARB staff issued a Notice of Public Availability of Modified Text, and
15 again it is stated that the Board’s September 24 vote “approved a new section 1961.1, title 13,
16 California Code of Regulations (CCR), and approved amendments to sections 1900 and 1961,
17 title 13.” CARB has also informed the California Legislature that it has “approved ... specific
18 standards” relating to fuel economy. CARB, *Report to the Legislature and the Governor on*
19 *Regulations to Control Greenhouse Gas Emissions From Motor Vehicles* 8-9 & Table 3-1.
20 (Plaintiffs’ RJN Exh. 2.)

21 * * *

22 Defendant’s characterization of the foregoing actions in her opening brief either defies
23 reality or the State law that was the basis for CARB’s regulation. For example, defendant’s brief
24 states that on September 24, 2004, “the Air Resources Board did not actually adopt these

25 _____
26 ³⁴ See also National Resources Defense Council, *Press Statement: California Adopts Nation’s*
27 *First-Ever Global Warming Standard for Cars*, Sept. 24, 2004 (“California made history today
28 by *adopting* the most important motor vehicle pollution requirement since the catalytic converter
in the 1970s.” (emphasis added)), attached as Plaintiffs’ RJN Exhibit 6.

1 proposed regulatory amendments,” Mem. at 9, and at the present time, “there is not even a final
2 administrative decision,” Mem. at 22. If those statements were true, they would be a frank
3 admission that CARB has violated California law, which required the adoption of any rule
4 authorized by A.B. 1493 “[n]o later than January 1, 2005,” Cal. Health & Safety Code
5 § 43018.5(a), a requirement the Board recited last September in Resolution 04-28. It would
6 further mean that CARB’s resolution and its press materials misrepresented the nature of the
7 Board’s action.

8 A more fundamental problem with defendant’s current description of the Board’s
9 decision is that defendant treats the issue of “adoption” as if it were entirely a question of state
10 administrative procedure. It is not. Whether CARB has “adopted” preempted fuel economy
11 standards is a question of federal law. Federal law expressly prohibits any “adopt[ion]” of
12 preempted fuel economy standards, 49 U.S.C. § 32919(a), and whether a preempted adoption has
13 occurred is ultimately a question of federal law. Because federal law expressly distinguishes
14 between adopting and “enforc[ing],” and preempts both, Congress clearly intended to prohibit
15 more than merely the application of preempted regulations to individual parties. Congress
16 preempted state regulation at its first manifestation, which is the point of adoption. In addition,
17 the formal “effectiveness” date for the CARB regulation (2006) is irrelevant, under federal law.
18 The Supreme Court has long recognized that “[i]t is irrelevant to the existence of a justiciable
19 controversy that there will be a time delay before the disputed provisions will come into effect.”
20 *RRR Cases*, 419 U.S. at 143. The Supreme Court recognized that principle some 80 years ago.
21 *See Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925) (invalidating a state act some fourteen
22 months prior to its effective date).³⁵

23 ³⁵ It further does not matter that A.B. 1493 provided that the Legislature should review the
24 regulations. First, the legislature has already held a hearing on the regulations. *See* Fran Pavley,
25 *News*, Feb. 2005, at 2, (“On February 7, the Assembly Transportation Committee held an
26 informational hearing to review the regulations approved last year by the California Air
27 Resources Board (CARB) that will implement my bill, A.B. 1493, to reduce greenhouse gas
28 emissions from cars and light trucks. Both the Legislature and the CARB have done an
outstanding job in fulfilling the requirements of the bill.”); Plaintiffs’ RJN Exh. 7 at 2. Second,
A.B. 1493 does not condition the regulations on any express approval by the Legislature. All
regulations are potentially subject to legislative review -- regardless whether the authorizing

1 Simply put, CARB’s September 24, 2004 adoption of fuel economy standards, complete
2 with regulatory text, was an “adoption” of a rule under federal law. It was, at a minimum, the
3 “definitive statement” of the “agency’s position” on the issues relevant to this lawsuit. *Am. Med.*
4 *Colls.*, 217 F.3d at 780. Nevertheless, even treated as an issue of state administrative practice,
5 the administrative tasks emphasized by defendant are of no substantive significance.

6 First, as Board Resolution 04-28 indicates, CARB considered itself obliged by state law
7 to adopt carbon dioxide standards that are the functional equivalent of miles-per-gallon fuel
8 economy standards. That interpretation of state law is unquestionably final, and it brought A.B.
9 1493 into irreconcilable conflict with the federal fuel economy laws. Defendant does not
10 suggest that there is any likelihood that CARB will tender a different interpretation of the
11 requirements of state law in this regard.

12 Second, with respect to the particulars of CARB’s regulation pursuant to CARB’s
13 interpretation of state law, the CARB staff has not been delegated authority by CARB to revise
14 the Board’s action other than by non-substantive, technical modifications to the regulatory text --
15 nor could it do so under the California Administrative Procedure Act. Under Cal. Govt. Code
16 § 11346.8(c), neither CARB nor the Executive Officer (or her staff) can “adopt, amend, or repeal
17 a regulation which has been changed from that which was originally made available to the public
18 . . . unless the change is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently
19 related to the original text that the public was adequately placed on notice that the change could
20 result from the originally proposed regulatory action.” Were CARB, the Executive Officer or
21 the CARB staff to retreat from the standards adopted last September in any significant way, the
22 change would violate the California APA. Defendant does not even suggest such a possibility.³⁶

23 statute provides for such review or not. *Cf. RRR Cases*, 419 U.S. at 112, 145 (claims concerning
24 federal plan to reorganize railroads were ripe even though statute permitted a future
25 Congressional one-house veto before plan would take full effect).

26 ³⁶ Consistent with the narrow authority delegated to the staff, the only potential alterations to the
27 rule adopted by CARB last year have no significance to the federal preemption claims presented
28 here, which is probably why defendant’s opening brief does not mention them. After the
September 24, 2004 Board meeting, the CARB staff notified the public of three potential
modifications to the regulatory text that would (1) extend the life of emissions credits and debits;

1 Finally, the California Office of Administrative Law (“OAL”), mentioned in defendant’s
2 brief (Mem. at 22-23), cannot alter the substance of CARB’s fuel economy standards, nor can it
3 overturn CARB’s interpretation of A.B. 1493 as requiring fuel economy standards under the
4 guise of carbon dioxide standards. OAL review is carefully circumscribed and certainly cannot
5 direct CARB to not adopt greenhouse gas standards: As the California APA provides, and as
6 surely CARB would agree, OAL does not “substitute its judgment for that of the rulemaking
7 agency as expressed in the substantive content of adopted regulations.” Cal. Govt. Code
8 § 11340.1(a).

9 **3. Settled Doctrine Supports The Exercise Of Federal**
10 **Jurisdiction In This Case**

11 If defendant’s view of “finality” were the law, then a number of Supreme Court and
12 Ninth Circuit cases have been wrongly decided. Federal jurisdiction in a case such as this does
13 not depend on the completion of ministerial administrative action, as the following cases
14 demonstrate.

15 *a. Columbia Broadcasting System, Inc. v. United States (“CBS”), 316 U.S. 407*
16 *(1942).* The Supreme Court’s decision in *CBS* over 60 years ago established that courts look to
17 the substance of the agency’s action—not the agency’s self-serving descriptions of it—and
18 whether agency staff and the regulated parties are immediately impacted. In *CBS*, the Federal
19 Communications Commission (“FCC”) adopted what it termed an “expression of the general
20 policy we will follow in excising our licensing power” with respect to “chain broadcasting”
21 contracts between radio networks and local stations. *See id.* at 410-11. The FCC deferred the
22 effective date of its policy pending further order, *see id.* at 412, and when a legal challenge was
23 brought against the policy, the FCC “promulgated a supplemental ‘minute’ setting up a
24 procedure by which the validity of the regulations might be tested upon application for a license

25
26 (2) adjust indirect emissions allowances for air conditioning systems that use carbon dioxide as a
27 refrigerant; and (3) correct the inadvertent omission of a modeling adjustment applicable to the
28 calculation of an indirect emissions factor. CARB, *Notice of Public Availability of Modified*
Text at 1-2, available at <http://www.arb.ca.gov/regact/grnhsgas/grnhsgas.htm> (May 2, 2005).

1 by an individual licensee,” *id.* at 413. The FCC then argued that any court challenge should
2 await further agency proceedings, and that the FCC’s statement of policy was “no more subject
3 to review than a press release similarly announcing its policy.” *Id.* at 422. The Supreme Court
4 disagreed. First, the Court disregarded the agency’s self-serving description of its actions: “The
5 particular label placed upon it by the Commission is not necessarily conclusive, *for it is the*
6 *substance of what the Commission has purported to do and has done which is decisive.*” *Id.* at
7 416 (emphasis added). Then, with respect to the substance, the Supreme Court described the
8 FCC’s action in terms equally applicable to CARB’s September 24, 2004 resolution:

9 When, as here, the regulations are avowedly adopted in the exercise of [delegated
10 legislative] power, couched in terms of command and accompanied by an
11 announcement of the Commission that the policy is one ‘which we will follow in
12 exercising our licensing power,’ they must be taken by those entitled to rely upon
13 them as what they purport to be—an exercise of the delegated legislative power—
14 which, until amended, are controlling alike upon the Commission and all others
15 whose rights may be affected by the Commission’s execution of them. The
Commission’s contention that the regulations are no more reviewable than a press
release is hardly reconcilable with its own recognition that the regulations afford
legal basis for cancellation of the license of a station if it renews its contract with
appellant.

16 *Id.* at 422. The plaintiffs and the public have treated CARB’s September 24, 2004 resolution as
17 an exercise of the legislative power delegated to CARB by A.B. 1493. Defendant’s
18 characterization of CARB’s action as merely a “proposal” to the Executive Officer can and
19 should be disregarded.³⁷

20 *b. Regional Railroad Reorganization Cases.* The Supreme Court’s decision in the
21 *RRR Cases* demonstrated again that federal courts look to the substance of the legal issues
22 presented, and will act as soon as those issues can be decided in order to minimize hardship. The
23 *RRR Cases* involved a wide-ranging Takings Clause challenge to the federal Regional Rail

24 _____
25 ³⁷ The same is true of defendant’s emphasis upon language in Resolution 04-28 “that, subject to
26 further environmental analysis, the Board is initiating steps towards final adoption.” *See* Mem.
27 at 9. That phrasing is inscrutable on its own terms, and in the context of the Resolution as a
28 whole, it would appear that “initiating steps towards final adoption” means complete and total
sign-off by the Board. No *other* Board action was noted at the time, and defendant does not
suggest any in her brief. *See* Dana Decl. ¶ 8.

1 Reorganization Act. Passed in response to the bankruptcies of several large rail companies in the
2 early 1970's, the heart of the Act established a governmental corporation that was directed to
3 formulate a comprehensive plan for restructuring the national rail system. Under the Act, the
4 "Final System Plan" developed by the new government corporation was subject to approval both
5 by Congress and by a special reorganization court. 419 U.S. at 109-17. Before a "Final System
6 Plan" had even been developed -- and long before it was approved by Congress or the special
7 reorganization court -- the rail companies challenged the Act's central provision requiring
8 conveyance of their properties. A specially-constituted three-judge District Court found that the
9 parties' challenge to the conveyance provisions of the Act was premature, and thus refused to
10 adjudicate the merits. *Id.* at 138. The Supreme Court disagreed.

11 Notwithstanding the fact that the process was still not concluded, the Supreme Court in
12 the *RRR Cases* found that the issues were plainly ripe for review. Addressing concerns that no
13 Final System Plan had been developed, much less submitted to the special court for review, the
14 Supreme Court explained: "[I]mplementation of the Rail Act will now lead inexorably to the final
15 conveyance, although the exact date of that conveyance cannot be presently determined." *Id.* at
16 140. The Supreme Court noted, first, that the Act required some type of conveyance. *Id.* Next,
17 though no particular property had yet been designated for transfer, the Court found that it was a
18 virtual certainty that some of the property would be slated for redistribution. *Id.* at 140 & n.26.
19 Finally, even though the special court had previously claimed a power to halt the conveyances
20 called for by the Final System Plan in the event it considered them to be unconstitutional, the
21 Court found that possibility too speculative to warrant delaying its adjudication of the
22 constitutionality of the conveyance mechanism in the first instance. *Id.* at 141.

23 As the Supreme Court held in the *RRR Cases*: "Where the inevitability of the operation of
24 a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable
25 controversy that there will be a time delay before the disputed provisions will come into effect."
26 *Id.* at 143. In this case, it is inevitable that CARB will impose greenhouse gas standards.
27 Indeed, defendant expects the ministerial tasks to be complete by September. The plaintiffs have
28 pleaded substantial hardship in the First Amended Complaint and defendant has accepted the

1 pleadings for purposes of her motion to dismiss. (See p. 5 above.) This satisfies the tests for
2 inevitability and hardship in the *RRR Cases*.

3 c. *PG&E v. State Energy Res. Conservation & Dev. Comm’n* (“*PG&E*”). If there
4 were any doubt that the principles of *CBS*, *Abbott Labs*, and the *RRR Cases* apply to State laws
5 and regulations, the Supreme Court laid those doubts to rest in *PG&E*. In *PG&E*, utilities
6 brought a federal preemption challenge to several California regulations governing the
7 permitting process for new nuclear facilities. *PG&E*, 461 U.S. at 198. One of the contested
8 regulations prevented the relevant state agency from certifying any nuclear power plants until the
9 agency concluded, and reported to the state legislature, that there was a readily available
10 technology for disposing of spent nuclear fuel and other nuclear waste. California objected on
11 ripeness grounds, arguing that the agency had not yet denied any requests for certification of a
12 new nuclear facility, and thus that there was no final agency action to review. The Supreme
13 Court rejected California’s ripeness defense: “The question of preemption is predominantly
14 legal, and although it would be useful to have the benefit of California’s interpretation of what
15 constitutes a demonstrated technology or means for the disposal of high-level nuclear waste,
16 resolution of the preemption issue need not await that development.” *Id.* at 201. *PG&E* thus
17 demonstrates that if the operation of a preempted regulation of party conduct is inevitable,
18 insistence on the completion of all administrative formalities should not obstruct prompt judicial
19 review.

20 d. *Union Pac. RR. Co. v. Cal. Pub. Util. Comm’n*. The Ninth Circuit recently
21 made quick work of a ripeness objection very similar to that presented here. In *Union Pacific*,
22 the Court addressed a series of industry challenges to California railroad regulations promulgated
23 in alleged violation of the Supremacy and Dormant Commerce Clauses. Most pertinent here,
24 plaintiffs challenged a “rule requiring the Railroads to cooperate in the development and the
25 implementation of performance-based train make-up standards,” arguing the implementation of
26 standards still to be developed under that rule would unreasonably burden interstate commerce.
27 346 F.3d at 870-71. California argued that the industry’s challenge was not yet ripe:
28

1 Without any performance-based standards to review, the Railroads cannot meet
2 their burden of proof that such regulatory oversight [is unconstitutional]. A
3 finding of excessive burdens on interstate commerce is premature on this
4 record. . . . The possibility of developing a workable and constitutional
performance-based standard should not be precluded *before the effort is even
begun to develop one.*

5 Reply Brief for Appellee at 21, *Union Pacific*, 346 F.3d 851, available at 2002 WL 32123105
6 (filed Jan. 7, 2002) (emphasis added); *see also* Mem. at 21-22, 28-29. Yet the Ninth Circuit
7 soundly rejected California’s argument. “CPUC argues this claim is not ripe because no
8 standards are issued. This argument fails because it is clear that *any* standard required would
9 impermissibly burden interstate commerce.” *Union Pacific*, 436 F.3d at 872 n.22 (emphasis
10 added). Likewise, it is beyond legitimate dispute in this case that CARB will try to enforce what
11 plaintiffs wish to argue are impermissible fuel economy standards, and *Union Pacific* forecloses
12 defendant’s ripeness objection.

13 * * *

14 None of defendant’s cases contradict the governing law of the Supreme Court and the
15 Ninth Circuit. In the main, defendant cites a number of finality cases decided under the federal
16 Administrative Procedure Act. *See* Mem. at 21.³⁸ Defendant’s analysis stumbles because the
17 federal APA has a *jurisdictional* requirement of finality, *see* 5 U.S.C. § 704, which applies *over*
18 *and above* prudential ripeness, as one of the cases cited by defendant expressly notes. *See Ukiah*
19 *Valley Med. Ctr. v. FTC*, 911 F.2d 261, 264 n.1 (9th Cir. 1990) (“[A] finding of finality, or of an
20 applicable exception, is essential when the court’s reviewing authority depends on one of the
21 many statutes permitting appeal only of ‘final’ agency action, such as § 10 of the APA, 5 U.S.C.

22 ³⁸ Not only are the APA finality discussions in cases cited by defendant legally irrelevant, the
23 facts of the particular cases chosen by defendant are far afield. *See, e.g., Ukiah Valley*, 911 F.2d
24 at 263-64 (rejecting legal challenge to administrative complaint filed by FTC before an
25 administrative law judge because the filing of a complaint by the FTC is not final agency action);
26 *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990) (rejecting motion to
27 require Forest Service to make ruling on two companies’ timber buy-out contracts with respect
28 to issue never pressed before the Forest Service); *Sierra Club v. United States Nuclear*
Regulatory Comm’n, 825 F.2d 1356 (9th Cir. 1987) (rejecting environmental groups’ attempted
interlocutory petition for review of denied motions made in the midst of an NRC proceeding
regarding operations at a California reactor).

1 § 704.”). “Finality” under the federal APA is a higher hurdle than prudential ripeness for good
2 reason. A federal APA challenge can include allegations of both substantive and procedural
3 invalidity, which places a premium upon procedural finality. A purely substantive challenge to
4 state action under 42 U.S.C. § 1983, however, does not give rise to the same procedural issues.
5 At any rate, defendant’s various statements that the Court can find a lack of finality and thereby
6 disregard hardship, *see* Mem. at 31, are wrong. Any consideration of “finality” in this case is
7 merely prudential, not jurisdictional. *See Ukiah Valley*, 911 F.2d at 264 n.1.

8 A case that illustrates how prudential ripeness doctrine requires balancing fitness for
9 review against hardship—and how bureaucratic finality is not a make-or-break factor—is
10 *American Medical Colleges*, which defendant cites several times but never properly describes.
11 *American Medical Colleges* involved an attempted legal challenge to how the Inspector General
12 of the Department of Health and Human Services and the Department of Justice were conducting
13 “audits for reimbursements made to teaching hospitals under Part B of the Medicare Act.” *Am.*
14 *Med. Colls.*, 217 F.3d at 773. The district court held that the audits were not “final agency
15 action” under the federal APA and therefore the court lacked jurisdiction. *See id.* at 778. The
16 Ninth Circuit, however, did not address APA finality, but instead addressed only prudential
17 ripeness. In so doing, the Ninth Circuit reviewed the fitness of the issues for review, and then
18 the “Balance of Hardships.” *See id.* at 782-83. With respect to fitness for review, the Ninth
19 Circuit noted the apparent lack of traditional finality. The audits were essentially an
20 “investigation,” and “[a]n investigation, even one conducted with an eye to enforcement, is
21 quintessentially non-final as a form of agency action,” because, among other things, “it is an
22 open question whether the ... audits will actually result in findings of abuse or fraud.” *Id.* at
23 781. The Court then went on, as prudential ripeness requires, to consider hardship.³⁹ The lesson

24 ³⁹ No reasonable reader of the “Balance of Hardships” section of the *American Medical Colleges*
25 decision, 217 F.3d at 782-83, would conclude -- as defendant purports to conclude -- that the
26 Court “ruled that the hardship question was not applicable because the challenged practice was
27 ‘not a final rule.’” Mem. at 32 (quoting *Am. Med. Colls.*, 217 F.3d at 783, out of context). To
28 the contrary, the Ninth Circuit expressly “balance[d]” hardship against fitness for review, which
is the whole point of that section of the opinion, and the Ninth Circuit did not find sufficient
hardship to warrant review.

1 from *American Medical Colleges* is that a court must weigh both the fitness of the issues for
2 decision and hardship, and technical notions of “finality” are not determinative.

3 **4. Waiting For A Case In The D.C. Circuit To Be Decided Is Not**
4 **A Proper Basis To Dismiss On Ripeness Grounds.**

5 Aside from defendant’s misguided notions of “finality,” Defendant also contends that the
6 pendency of *Massachusetts v. EPA*, a case in the D.C. Circuit, requires dismissal of this case on
7 ripeness grounds. That case involves California’s challenge to EPA’s legal conclusion that
8 carbon dioxide is not an “air pollutant” and that EPA thus lacks authority under the Clean Air
9 Act to adopt “carbon dioxide standards” for new motor vehicles.

10 Whatever EPA’s authority with respect to carbon dioxide standards that regulate fuel
11 economy, federal law could not be more clear as to the authority of the States with respect to fuel
12 economy. No State -- including California -- may adopt any regulation “related to fuel economy
13 standards.” 49 U.S.C. § 32919(a). No matter what the D.C. Circuit decides with respect to
14 EPA’s authority, the federal fuel economy statute’s clear prohibition of state fuel economy
15 standards forecloses CARB’s rule. NHTSA has specifically explained to California that the
16 federal fuel economy statute prohibits all States, including California, from regulating fuel
17 economy. *See Light Truck Average Fuel Economy Standards Model Years 2005-2007*, 67 Fed.
18 Reg. 77015, 77025 (Dec. 16, 2002); FAC ¶ 64.

19 As an initial matter, it should be clear that preemption under the federal fuel economy
20 statute is not the only basis for the illegality of CARB’s rule. The current authoritative
21 interpretation of the Clean Air Act also forbids CARB’s rule, which is the basis for plaintiffs’
22 Count II. EPA has recognized that any significant regulation of greenhouse gases under the
23 Clean Air Act would conflict with the regulation of fuel economy by NHTSA under the Energy
24 Policy and Conservation Act, 49 U.S.C. § 32902 *et seq.*, and for that reason, EPA has concluded
25 that the Clean Air Act provides EPA no authority to regulate carbon dioxide:

26 Congress has not authorized the Agency to regulate [carbon dioxide] emissions
27 from motor vehicles to the extent such standards would effectively regulate the
28 fuel economy of passenger cars and light duty trucks. No technology currently
exists or is under development that can capture and destroy or reduce emissions

1 of [carbon dioxide], unlike other emissions from motor vehicle tailpipes. At
2 present, the only practical way to reduce tailpipe emissions of [carbon dioxide] is
3 to improve fuel economy. Congress has already created a detailed set of
4 mandatory standards governing the fuel economy of cars and light duty trucks,
and has authorized DOT -- not EPA -- to implement those standards. ... [The
federal fuel economy statute] is the only statutory vehicle for regulating the fuel
economy of cars and light duty trucks.

5 68 Fed. Reg. 52,922, 52,929 & n.4 (Sept. 8, 2003). By that same reasoning, the Clean Air Act
6 prohibits CARB's rule, because CARB can only adopt emission standards that are "consistent
7 with" the emission standards EPA may adopt. 42 U.S.C. § 7543(b).

8 Defendant asserts that "[i]f the District of Columbia Circuit disagrees with US EPA's
9 position that the US EPA does not have authority to regulate carbon dioxide for climate change
10 purposes, that decision will bolster [the State's] arguments asserted in defense of this lawsuit."
11 Mem. at 26. That is not true with respect to the federal fuel economy statute. The hypothetical
12 decision by the D.C. Circuit favorable to defendant would potentially bear upon arguments that
13 the Clean Air Act does not prohibit CARB's rule. The federal fuel economy statute's
14 preemption of CARB's rule would remain the same.

15 In any event, defendant's desire to await the possibility of more favorable legal authority
16 under the Clean Air Act to bolster arguments with respect to a single count in the complaint is
17 not a basis for a ripeness dismissal. Federal courts do not dismiss cases (or even individual
18 counts) on ripeness grounds because issues in the case might be interpreted by other federal
19 courts. Rather, courts are informed by the views of their peers in considering the merits of the
20 cases before them.

21 **5. Defendant's Speculation About Future Federal Fuel Economy**
22 **Standards Does Not Defeat Jurisdiction.**

23 Defendant's final suggestion of non-ripeness asserts that because NHTSA has not yet
24 promulgated specific federal fuel economy standards for light-duty trucks for all future model
25 years, or because Congress might increase the fuel economy standards for passenger cars, this
26 case is unripe. According to defendant, the Court may not be able to assess the extent of the
27 conflict between CARB's fuel economy standards and the federal government's. Mem. at 29-30.

1 Defendant’s argument cannot be reconciled with the main premise of the CARB
2 rulemaking, which is that federal standards in this area are not adequate, in the judgment of
3 California. For example, defendant’s brief begins by seeking to justify CARB’s “approved”
4 standards on the ground that the federal government will not adopt a comparable regulation “any
5 time soon, if at all.” *Id.* at 1. Defendant thus concedes that California’s regulatory actions
6 impose more stringent requirements than federal law. Defendant certainly has no basis for
7 suggesting that Congress or NHTSA will follow CARB’s lead.⁴⁰ Indeed, in the rulemaking
8 record before CARB in 2004, defendant assumed that the federal fuel economy standards would
9 not change at any point over the next few decades.⁴¹

10 Moreover, defendant’s timing argument misreads EPCA’s preemption clause. So long as
11 there is *currently* a federal fuel economy standard in place, States cannot *currently* adopt any
12 regulation “related to fuel economy standards.” The express preemption clause begins: “When
13 an average fuel economy standard prescribed under this chapter *is* in effect.” 49 U.S.C.
14 § 32919(a) (emphasis added). The point of the preemption clause is that so long as NHTSA has
15 set fuel economy standards for particular vehicles, no State may adopt its own fuel economy
16 standards, regardless of when those standards might take effect.

17 In addition, state fuel economy standards of any stringency would conflict with the
18 deliberate structure of the federal fuel economy regime. Congress and NHTSA established
19 *national* average fuel economy standards, thereby permitting manufacturers to produce for sale
20 whatever vehicles are demanded by consumers in particular states so long as manufacturers meet
21 the *national* average. (See FAC ¶¶ 41-46.) Even if California were simply to adopt the *same*
22 fuel economy standards as the federal government, they would still conflict with federal law and
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24 ⁴⁰ Such a step would be inconsistent with the current federal law as administered by NHTSA.
25 NHTSA’s application of its standard-setting authority under the federal law is reviewed in
Weverstad Decl. ¶¶ 17-25.

26 ⁴¹ See Austin Decl. ¶ 28 (“CARB’s estimate of the reduction [in] CO2 emissions [caused by its
27 rule] assumes there will be no change in the fuel economy of passenger cars or light-duty trucks
28 in the absence of the regulation” through at least calendar year 2030).

1 be preempted, because the state-level enforcement of the national standards reduces the
2 flexibility of the federal program. At a minimum, if manufacturers were required to meet the
3 federal fuel economy standards in specific states within the nation, manufacturers would have to
4 track and manage the fuel economy of the group of vehicles produced for sale in those States --
5 each of which would have a unique product mix based on the needs and preferences of that
6 State's consumers. Such a requirement could lead to significant product restrictions in States
7 whose residents prefer larger cars and trucks.

8 Of course, CARB's fuel economy standards are far more stringent than the current
9 national standards, and CARB also categorizes vehicles differently than NHTSA categorizes
10 vehicles. *See* FAC ¶¶ 72-73. CARB's rule combines some light-duty trucks in with passenger
11 cars; NHTSA does not. *Id.* CARB prescribes fuel economy standards for large vehicles for
12 which federal law deliberately has no fuel economy standard. *Id.* In those respects the
13 California rule inherently compromises the flexibility of the federal fuel economy program.

14 Finally, the substance of defendant's objection -- which is that some factual issues may
15 exist regarding the precise differences between the CARB and federal standards -- is hardly a
16 basis for dismissal on ripeness grounds. The Court must take all of the allegations in the First
17 Amended Complaint as true, particularly because defendant has not produced any competent
18 evidence to the contrary. *See Bennett v. Spear*, 520 U.S. 154, 168 (1997); *Drier*, 95 F.3d at,
19 1439 (9th Cir. 1996). On summary judgment, defendant is certainly free to argue that judgment
20 in favor of plaintiffs is not warranted because of material disputes of fact. Those disputes are
21 not, however, a basis for dismissal on ripeness grounds.

22 **B. Plaintiffs Have Demonstrated Significant Hardship If The Court Does Not**
23 **Accept Jurisdiction**

24 As discussed above, the two elements of ripeness -- fitness of the issues for review and
25 hardship to the parties -- must be balanced together. (*See* pp. 16-17 and 28-30 above.)
26 Defendant's "finality" concerns are immaterial, but even if they had any substance, they are
27 "outweigh[ed]" by the immediate hardship plaintiffs suffer if adjudication of the illegality of
28 CARB's standards is postponed. *See Chavez*, 961 F.2d at 1414; *Friedman Bros.*, 676 F.2d at

1 1319. The allegations in the First Amended Complaint must be taken as true, *see* p. 5 above, and
2 those allegations explain the immediate hardships imposed upon dealers and vehicle
3 manufacturers.

4 The first model year to which CARB’s rule has mandatory application is model year
5 (“MY”) 2009. A “model year” can begin as early as January 2 of the preceding calendar year.
6 Thus, MY 2009 can start as early as January 2, 2008. Vehicle manufacturers already have
7 complete product plans for MY 2009. CARB’s regulation requires “those product plans [to] be
8 altered (to the extent feasible), new vehicles [to] be designed, and some manufacturers . . . to
9 restrict or eliminate particular vehicles they had planned to sell in California.” (*See* FAC ¶ 100.)
10 Model year 2010 is also virtually complete at the design stage. In order to produce large
11 numbers of new models for California in time for model year 2011, work must get under way
12 this year, in calendar year 2009. *See* FAC ¶ 101 (CARB rule requires “immediate commitments
13 of new resources and a redirection of their current vehicle programs will be required in order for
14 some manufacturers to comply”).

15 As plaintiffs aver and as defendant is obliged to assume on the current motion, the
16 National Academy of Sciences has estimated four to eight years lead time even for “existing
17 technologies” to be included in new models. (*See* FAC ¶ 102.) The 2011 model year starts in
18 2010, less than five years from now, and near the *short* end of the NAS estimated time to deploy
19 new technologies. As plaintiffs further state, and as defendant must also concede, the immediate
20 changes in conduct required by the CARB rule include “allocat[ing] scarce engineering and
21 capital resources to those models that could remain in production for California,” and canceling
22 “[s]ome programs designed for the national market that would achieve gradual but steady
23 increases in national fuel economy . . . so that resources can be devoted to other programs just
24 for California.” (*See* FAC ¶ 101(a).)

25 As the First Amended Complaint further states, time is of the essence because “[i]f a
26 manufacturer does not re-focus its product development effort now on the [greenhouse gas]
27 regulation, it will not be able to comply with the California rule.” (*See id.* ¶ 101(a).)
28 Manufacturers must also “[s]ign[] contracts with suppliers to provide the equipment needed to

1 produce newly redesigned vehicles, ... sometimes coupled with [unrecoverable] direct
2 investment in those suppliers' production facilities to ensure that the supplier can meet the terms
3 of the contract.” (*Id.* ¶ 101(b).) Such contracts normally have cancellation fees if later
4 terminated, and the manufacturers cannot recover those costs from anyone else, least of all the
5 State, if the CARB rule is later invalidated. (*Id.* ¶¶ 101(b), 106.)

6 The immediate need to assign resources for California compliance also has other
7 immediate consequences. Other programs that were planned for other purposes, specifically “in
8 order to remain competitive outside California,” will have to be deferred. (FAC ¶ 82.) This
9 causes a loss in sales, profits and goodwill in the other regions of the country. (*Id.*) To minimize
10 the time needed to bring new vehicles to market and to manage the costs of compliance, some
11 manufacturers will have to resort to joint ventures with competitors. Surrendering their
12 competitive advantages is costly, and once shared, the value of their engineering trade secrets is
13 inherently diminished, but the California rule gives those manufacturers no practical alternative.
14 (*Id.* ¶ 83.)

15 In order to have any chance of complying with the CARB rule, manufacturers will be
16 forced to “[a]llocat[e] engineers and prototype production resources to build newly redesigned
17 vehicles,” and to expend “hundreds of millions of dollars . . . long before the first model year
18 2009 vehicle starts mass production.” FAC ¶ 101(c). Indeed, “[t]hose investments must begin
19 *now* in order for those companies to have any hope of remaining competitive in California and
20 complying with the [greenhouse gas] rules, even with limited product lines.” (*Id.* (emphasis
21 added).) Thus, as plaintiffs explain:

22 The impact of Defendant’s regulation is direct and *immediate* and requires
23 changes in manufacturers’ *present* conduct. Specifically, (1) current product
24 plans must be scrapped, (2) engineering resources must be assigned to the
25 California regulations, allowing the projects those engineers would otherwise
26 address -- in particular, vehicle designs for markets other than California -- to
languish, (3) supply contracts must be negotiated, and (4) investments in new
production facilities must be made, long before meeting with CARB staff in the
summer of 2007.

27 *See* FAC ¶ 103 (emphasis added).
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1 In addition, as the First Amended Complaint states, some manufacturers are tightly
2 constrained in the resources they can expend on compliance with CARB's regulation. Current
3 financial conditions have made "it very difficult and costly for those companies to find the
4 resources for new vehicle programs on the scale required by CARB's regulation, assuming that
5 there is any economically practicable method for those companies to comply." (See FAC ¶ 104.)

6 Those manufacturers

7 face an immediate dilemma between attempting to comply with this new
8 regulation, or facing insurmountable compliance obstacles or serious sanctions in
9 the future if compliance is not undertaken this year. Adjudication *now* of the
legality of Defendant's regulation is the only way to prevent, or at least minimize,
irreparable harm to manufacturers.

10 FAC ¶ 107. Those allegations more than suffice to demonstrate immediate hardship. As this
11 Court recognized in earlier litigation, resources spent on a regulation later found to be unlawful
12 cannot be recovered from the State, and can constitute irreparable injury. See FAC Exh. B at 16-
13 17; see also *Entergy v. Nebraska*, 210 F.3d 887, 899-900 (8th Cir. 2000) (finding irreparable
14 injury due to "the likely unavailability of money damages should the Commission prevail on the
15 merits of its claims. Relief in the form of money damages could well be barred by Nebraska's
16 sovereign immunity"); *Freehold Cogeneration Associates, L.P. v. Bd. of Regulatory Com'rs of*
17 *State of N.J.*, 44 F.3d 1178, 1188-89 (3d Cir. 1995) (sustaining the exercise of jurisdiction
18 because "[plaintiff] cannot recover damages from the [state regulatory agency] if it prevails on
19 the merits").

20 Manufacturers thus face a Hobson's choice. They must either (1) sacrifice current
21 production plans and jeopardize their financial viability by investing hundreds of millions of
22 dollars of unrecoverable capital and manpower in the development and implementation of costly
23 new compliance strategies for the California rule, or (2) risk the eventual imposition of massive
24 penalties or a forced withdrawal from the California market and the concomitant abandonment of
25 the numerous dealerships marketing vehicles that can no longer be sold in compliance with
26 California law. That dilemma is a textbook illustration of hardship:

27 As the Court of Appeals cogently reasoned, for the utilities to proceed in hopes
28 that, when the time for certification came, either the required findings would be

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made or the law would be struck down, requires the expenditures of millions of dollars over a number of years, without any certainty of recovery if certification were denied. The construction of new nuclear facilities requires considerable advance planning—on the order of 12 to 14 years. Thus, as in the *Rail Reorganization Act Cases*, 419 U.S. 102, 144 (1975), ‘decisions to be made now or in the short future may be affected’ by whether we act.

PG&E, 461 U.S. at 201-02; *see also Abbott Labs.*, 387 U.S. at 152-53 (“If petitioners wish to comply they must change all their labels, advertisements, and promotional materials; they must destroy stocks of printed matter; and they must invest heavily in new printing type and new supplies. The alternative to compliance . . . may be even more costly.”); *CBS*, 316 U.S. at 413, 423 (sustaining the exercise of jurisdiction over an unapplied regulation where the threat of its eventual enforcement allegedly impaired “appellant’s ability to conduct its business and maintain its public broadcasting service . . . and [where] the regulations will make the operation of appellant’s business more costly, reduce its earnings and render its property and business less valuable”); *Middle S. Energy, Inc. v. Arkansas Public Service Com’n*, 772 F.2d 404, 413 (8th Cir. 1985) (finding hardship sufficient to support jurisdiction where “the threatened action is likely to cause great injury, in the form of higher financing costs”); *Freehold Cogeneration*, 44 F.3d at 1188-89 (sustaining jurisdiction because “[i]t takes but little experience in financial markets to realize that lending institutions will not lend a borrower large sums of money when the life of the underlying project is threatened”); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 524 (3rd Cir. 1976) (explaining that a regulation can “put[] the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action’s validity, he must change his course of day-to-day conduct, for example, by undertaking substantial preliminary paper work, scientific testing and recordkeeping [or] alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence”).

C. Defendant Concedes That This Case Will Be Ripe In “September Of This Year, At The Latest,” Which Is Reason Enough To Deny Her Motion.

Notwithstanding her list of bureaucratic tasks that remain to be accomplished, defendant is obliged to concede that those steps will be completed in a few months, in “September ... at the

1 latest.” (See Mem. at 34.) Taken at face value that concession sufficiently addresses her
2 ripeness concerns. There is no possibility that any judgment of this Court will interfere with the
3 remaining ministerial steps, simply because those steps will have been completed before this
4 Court would reach the merits. Ripeness at the time when the merits are decided is what
5 matters.⁴²

6 While defendant suggests that plaintiffs wait a few months and “then ... bring a motion
7 for a preliminary injunction,” Mem. at 34, and while plaintiffs would be prepared to proceed in
8 that manner if necessary, plaintiffs would prefer to proceed under an expedited summary
9 judgment briefing schedule, so the Court could dispose of the merits without having to first
10 consider a motion for a preliminary injunction. Depending on the Court’s calendar, an
11 appropriate expedited summary judgment schedule could permit a hearing and a decision by
12 September, when defendant appears to concede the case would be ripe. Between now and then,
13 the completion of defendant’s ministerial duties will not affect the legal issues presented here,
14 and courts have rejected ripeness challenges based on far lengthier potential delays. *See, e.g.,*
15 *MidAm. Energy*, 234 F.3d at 1039 (“Here, the parties are but *three years* from the
16 decommissioning decision. Were we to withhold adjudication, they would perforce return here
17 shortly, making precisely the same arguments, with nary a scintilla of additional relevant
18 evidence.”) (emphasis added).

19 **II. EPA DOES NOT HAVE PRIMARY JURISDICTION OVER COUNT II.**

20 Count II of the First Amended Complaint alleges that CARB’s standards are preempted
21 under the federal Clean Air Act for two purely legal reasons: *First*, CARB’s standards are a
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23 ⁴² *See Buckley*, 424 U.S. at 113-14; *RRR Cases*, 419 U.S. at 139-40; *Am. Motorists Ins. Co. v.*
24 *United Furnace Co.*, 876 F.2d 293, 302 n.4 (2d Cir. 1989); *New Orleans Pub. Serv. v. Council of*
25 *City of New Orleans*, 833 F.2d 583, 586 n.2 (5th Cir. 1987); *Henley v. Herring*, 779 F.2d 1553,
26 1555 (11th Cir. 1986); *Stewart v. Hannon*, 675 F.2d 846, 850 (7th Cir. 1982). Cases sometimes
27 ripen only on appeal, which still permits appellate courts to address the merits and disregard any
28 doubts over the case’s ripeness at the time of the district court’s decision. *See, e.g., Buckley*, 424
U.S. at 113-114; *RRR*, 419 U.S. at 140; *Assiniboine & Sioux Tribes*, 792 F.2d at 788.

1 preempted “standard” related to the control of emissions from new motor vehicles that is
2 preempted by section 209(a) of the Clean Air Act; and *second*, CARB’s regulation of greenhouse
3 gases is not “consistent with” section 202(a) of the Clean Air Act because section 202(a) does
4 not permit regulation of greenhouse gases, as EPA itself has concluded as a matter of statutory
5 interpretation. (*See* 42 U.S.C. § 7543(a) & (b); FAC ¶ 122-23.)

6 Defendant essentially ignores the first question raised by Count II (preemption under
7 section 209(a)), and then argues instead that “the question raised by Plaintiffs’ second claim” --
8 *i.e.*, whether CARB’s regulation of greenhouse gases is “consistent with” section 202(a) of the
9 Clean Air Act -- “is specifically entrusted to the Administrator of US EPA.” Mem. at 35.
10 Defendant’s invocation of EPA’s “primary jurisdiction” is both disingenuous and incorrect as a
11 matter of law. It is disingenuous because defendant expressly states elsewhere in her brief that
12 *defendant* is unwilling to “specifically entrust[]” EPA with these issues. (*See* Part A below.) It
13 is incorrect as a matter of law because Count II raises pure questions of federal statutory
14 interpretation that courts can and have addressed without any input from EPA. Defendant’s
15 contention that “Plaintiffs’ second claim will never be properly before this Court,” Mem. at 38-
16 39 n.23, would preclude resort to 42 U.S.C. § 1983 in a manner that is both extreme and
17 unprecedented. “[T]here is a presumption that a ... statute creating enforceable rights may be
18 enforced in a section 1983 action.” *Keaukaha-Panaewa Cmty. Ass’n v. Hawaiian Homes*
19 *Comm’n*, 739 F.2d 1467, 1470 (9th Cir. 1984). Defendant’s arguments fail to recognize, and
20 certainly do not overcome, that presumption. (*See* Part B below.)

21 **A. Defendant’s Invocation Of Primary Jurisdiction Is Contradicted by Her**
22 **Refusal To Acknowledge EPA’s Authority.**

23 Since the early 1970s, California’s regulation of new motor vehicle emissions has only
24 been permissible to the extent California receives a waiver of federal Clean Air Act preemption
25 from U.S. EPA. (*See* FAC ¶¶ 49-51.) The purpose of California’s limited authority was
26 recognition in the late 1960s of California’s severe smog problems. (*Id.* ¶ 50.) CARB’s rules for
27 motor vehicles must be reviewed and approved by EPA under section 209(b) before they can be
28 implemented.

1 CARB’s greenhouse gas rule attempts to transform California’s limited authority under
2 the Clean Air Act to adopt regulations battling smog and other ambient air problems into power
3 to regulate motor vehicle carbon dioxide, *i.e.*, fuel economy. Defendant suggests that CARB’s
4 authority in this area depends upon whether CARB receives a waiver of federal Clean Air Act
5 preemption from U.S. EPA, a determination that is, in defendant’s words, “explicitly committed
6 to the Administrator of US EPA.” Mem. at 37.

7 Whether U.S. EPA would ever have any input with respect to CARB’s regulation under
8 the provisions of section 209(b) is, however, entirely a matter within CARB’s control. U.S. EPA
9 would only address CARB’s regulation if CARB were to seek a waiver of federal Clean Air Act
10 preemption. (Dana Decl. ¶¶ 12-13.) Yet, defendant carefully refuses to concede that CARB will
11 ever make such a submission to EPA. The following passage from her brief illustrates
12 defendant’s equivocation:

13 These proposed regulatory amendments will need to be reviewed and approved by
14 US EPA, *assuming that a waiver is required under Clean Air Act section*
15 *209(b)*. ... *If a new waiver is required*, it is generally acknowledged that these
16 proposed regulatory amendments cannot be enforced (that is, are not effective)
17 until that waiver is granted.... *At this point, it is unknown whether a new waiver*
is required. If a new waiver is required, it is also unknown when and how US
EPA will act on that waiver request, and thus when these proposed regulatory
amendments will be effective and able to be enforced.

18 Mem. at 32-33 (emphasis added). Entirely consistent with defendant’s refusal to acknowledge
19 that a waiver is required, defendant elsewhere in her brief argues that EPA’s authority is
20 irrelevant to California’s authority to regulate motor vehicle carbon dioxide, such that CARB
21 could enforce its regulation without any EPA input at all. (*See* Mem. at 24-25 n.14.)

22 Defendant cannot have it both ways: she cannot argue that the issues raised by plaintiffs
23 are “specifically entrusted” to EPA, Mem. at 35 and “explicitly committed” to EPA, Mem. at 37;
24 and then reserve the right to enforce CARB’s regulation without ever seeking EPA’s
25 determination of those matters. Defendant’s “primary jurisdiction” argument should be
26 summarily rejected because of defendant’s unwillingness to commit to EPA the very issues that
27 defendant asserts are “specifically entrusted” to EPA. Indeed, defendant’s double-speak on this
28

1 point proves that there is a genuine dispute between plaintiffs and defendant as to whether
2 CARB's regulations are preempted by the Clean Air Act from the outset, regardless of a waiver.

3 **B. In Any Event, EPA Does Not Possess "Primary Jurisdiction" With Respect**
4 **To The Pure Questions Of Law Raised By Count II, And Congress Plainly**
5 **Has Not Precluded Resort To 42 U.S.C. § 1983.**

6 Notwithstanding defendant's equivocation as to EPA's role, defendant inappropriately
7 invokes the primary jurisdiction doctrine by confusing pure questions of law with questions of
8 agency fact-finding. Plaintiffs raise two pure questions of statutory interpretation under the
9 Clean Air Act that can and must be determined by federal courts. There is no doctrine by which
10 those questions must be addressed by EPA in the first instance, and defendant's arguments that a
11 section 1983 action can *never* be pursued are clearly incorrect.

12 As an initial matter, there is no principle of administrative law that courts must await an
13 agency's interpretation of law before the court interprets the law. "[T]he reviewing court shall
14 decide all relevant questions of law, interpret constitutional and statutory provisions, and
15 determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. The
16 only variation in that rule occurs if the agency has *already* offered an interpretation of the law
17 pursuant to authority "Congress delegated ... to the agency generally to make rules carrying the
18 force of law." *United States v. Mead*, 533 U.S. 218, 226-27 (2001). In that situation, a court
19 reviews the agency's interpretation of federal law by way of the familiar two-step interpretive
20 test of *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984):
21 "We ask first 'whether Congress has directly spoken to the precise question at issue.' ... If it
22 has, our inquiry ends; we 'must give effect to the unambiguously expressed intent of Congress.'
23 ... But if 'the statute is silent or ambiguous with respect to the specific issue, the question for
24 the court is whether the agency's answer is based on a permissible construction of the statute.'"
25 *Portland Adventist Med. Ctr. v. Thompson*, 399 F.3d 1091, 1095 (9th Cir. 2005) (quoting
26 *Chevron*, 467 U.S. at 842-43)(citations omitted).

27 If the agency has not interpreted the law, the court must do so itself. As the Ninth Circuit
28 recently observed, "in the absence of an administrative interpretation," it then becomes

1 “necessary” for the Court to “impose its own construction on the statute.” *See Handa v. Clark*,
2 401 F.3d 1129, 1135 (9th Cir. 2005). Courts interpret statutes that agencies also interpret, and
3 courts certainly do not dismiss cases for lack of an agency interpretation. *See, e.g., Neal v.*
4 *United States*, 516 U.S. 284, 295 (1996) (“Once we have determined a statute’s meaning, we
5 adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency’s later
6 interpretation of the statute against that settled law.”) (citations omitted). Interpreting the
7 preemptive scope of the Clean Air Act is no different. To the extent EPA has already interpreted
8 the relevant provisions -- and plaintiffs believe EPA’s determination that section 202(a) does not
9 permit regulation of greenhouse gases forbids CARB’s regulation, *see* FAC ¶ 123 -- then the
10 Court simply applies *Chevron*’s two-step test. To the extent there are unanswered questions of
11 statutory interpretation, the Court answers those questions the same way it answers any other
12 questions of federal statutory interpretation.

13 The leading example, for purposes of this case, is *Engine Manufacturers Association v.*
14 *South Coast Air Quality Management District*, 541 U.S. 246 (2004). As with Count II of this
15 case, the preemptive scope of section 209(a) of the Clean Air Act was at issue. 42 U.S.C.
16 § 7543(a). The defendant in that case, another California pollution agency, had applied specific
17 authority in the California Health & Safety Code to adopt “purchase restrictions” on certain
18 types of vehicles. The *South Coast* defendant argued that its “purchase restrictions” were not
19 preempted “standards” because they were not imposed directly upon manufacturers but upon
20 purchasers, and that they were similarly not a restriction on “initial retail sale” because they
21 regulated purchasers and not sellers. The district court and the Ninth Circuit addressed the
22 merits and concluded that section 209(a) did not preempt the purchase restrictions. The Supreme
23 Court reversed, concluding that the standards were preempted. Like the *South Coast* defendant,
24 in this case the CARB Executive Officer argues that CARB’s regulation is not preempted by
25 section 209(a) of the Clean Air Act. *See* Mem. at 24-25 n.14. That purely legal issue is as
26 justiciable here as it was in *South Coast*.

27 There is no doubt that if “primary jurisdiction” had been raised in *South Coast*, it would
28 have been rejected. In the leading Clean Air Act case involving section 209(a) in which primary

1 jurisdiction was raised, the First Circuit squarely rejected its application. In *Association of*
2 *International Automobile Manufacturers, Inc. v. Commissioner, Massachusetts Department of*
3 *Environmental Protection* (“AIAM”), 208 F.3d 1 (1st Cir. 2000), the plaintiffs challenged a
4 Massachusetts automobile emission regulation on the ground that it was preempted by section
5 209(a) of the Clean Air Act. The First Circuit eventually held that “the ultimate legal
6 determination of whether the Massachusetts regulations are preempted by the [Clean Air Act] is
7 a question of federal preemption law *for the courts alone to decide.*” *Id.* at 5 (emphasis added).

8 The First Circuit went on:

9 [T]he subsidiary issues of what constitutes a ‘standard’ under CAA §§ 209 and
10 177 and whether the ZEV mandates are ‘identical’ to California standards require
11 us to interpret the CAA for purposes of applying federal preemption law, not for
12 purposes of administering the CAA; as such, the issues fall squarely within this
Court’s jurisdiction but not within any particular expertise or special
administrative competence of the EPA.

13 *Id.* It is precisely the distinction the First Circuit recognized -- the difference between questions
14 of federal preemption and questions of Clean Air Act administration -- that rules out “primary
15 jurisdiction” in this case as well.

16 Defendant invokes EPA’s waiver process as if this case involved matters of EPA’s fact-
17 finding. In this respect, defendant’s comparison of this case with *Motor & Equipment*
18 *Manufacturers Association v. EPA* (“MEMA”), 627 F.2d 1095 (D.C. Cir. 1979), is far off base.
19 In *MEMA*, petitioners sought review of an EPA final decision under the judicial review
20 provisions in section 307 of the Clean Air Act. The issue was whether EPA’s “findings”
21 supported granting a waiver for a California rule “limiting the amount of maintenance that a
22 manufacturer can require of motor vehicle purchasers in the written instructions which
23 accompany new motor vehicles sold in that State.” *MEMA*, 627 F.2d at 1100-01. EPA had
24 granted the waiver, finding “no plausible evidence in the record to indicate that California’s new
25 in-use maintenance regulations would impair the ability of California’s emission standards
26 [from] protect[ing] the public health and welfare at least as ably as the corresponding federal
27 standards,” and also finding that “manufacturers had failed to show that adherence to the

1 regulations would be technologically infeasible, the costs of compliance considered.” *MEMA*,
2 627 F.2d at 1105.

3 This case is entirely different. Whether CARB’s “greenhouse gas” emission standards
4 are preempted “standards” under section 209(a) is a pure question of statutory interpretation.
5 Likewise, whether CARB’s regulation of “greenhouse gases” is “consistent with” section 202(a),
6 given that EPA has concluded as a matter of statutory interpretation that “greenhouse gases” are
7 not “pollutants” under section 202(a), is a pure question of statutory interpretation. Of course, if
8 CARB were to seek a waiver from EPA, plaintiffs would be perfectly entitled to argue that any
9 waiver would be contrary to the statute, and EPA’s decision could then be reviewed by the D.C.
10 Circuit. That possibility is, however, irrelevant. It is no more relevant than the possibility that
11 the defendant in *South Coast* might have petitioned EPA for a waiver, or that Massachusetts
12 might have petitioned for a waiver in *AIAM*.

13 Whether a waiver *can* be sought, or *will* be sought, does not alter the substance of the
14 statutory interpretation questions at issue. Count II presents pure questions of statutory
15 interpretation regardless whether a waiver is sought. Courts may defer to an agency’s
16 authoritative construction of an ambiguous federal statute, but courts simply do not await an
17 agency’s attempt at statutory interpretation.

18 Finally, one extreme element of defendant’s argument must be addressed. Defendant is
19 not merely arguing that referral to EPA might be prudent. To the contrary, defendant is arguing
20 for *dismissal* of Count II because “Plaintiffs’ second claim will never be properly before this
21 Court, but is only proper in a petition for review challenging US EPA’s decision on a waiver.”
22 Mem. at 38-39 n.23. Defendant is thereby contending that plaintiffs have no resort to 42 U.S.C.
23 § 1983 to enforce section 209 of the Clean Air Act because the Clean Air Act somehow
24 precludes such a section 1983 action. There is established doctrine with respect to the preclusion
25 of section 1983 actions, and it begins with a “presumption that a statute creating enforceable
26 rights may be enforced in a section 1983 action.” *Keaukaha-Panaewa Cmty. Ass’n*, 739 F.2d at
27 1470. As evidenced by the Supreme Court’s decision in *South Coast* and the First Circuit’s
28 decision in *AIAM*, section 209 of the Clean Air Act plainly creates enforceable rights, and those

1 two cases support enforcement by way of section 1983 because they both were section 1983
2 actions. At a minimum, a presumption in favor of section 1983 enforcement applies to this case,
3 and it is *defendant's* burden to identify a “comprehensive enforcement scheme that is
4 incompatible with individual enforcement under § 1983.” *Blessing v. Freestone*, 520 U.S. 329,
5 341 (1997). Defendant never acknowledges that burden, much less does defendant attempt to
6 meet it. Indeed, none of the primary jurisdiction cases cited by defendant involved a section
7 1983 lawsuit.

8 Defendant's motion to dismiss Count II should be denied because, first and foremost,
9 defendant is unwilling to commit to EPA's authority, which presents a justiciable threshold issue
10 of federal preemption. But even if defendant were not being so elusive with respect to CARB's
11 authority under the Clean Air Act, the legal questions presented by Count II are pure issues of
12 federal statutory interpretation properly adjudicated by this Court, and there is no basis for
13 concluding that Congress has precluded section 1983 actions to enforce the Clean Air Act's
14 preemption.

15 **III. THIS CASE WAS PROPERLY FILED IN FRESNO AND THIS COURT SHOULD**
16 **RETAIN IT.**

17 The 13 automobile dealers in Fresno, Stanislaus, and Tulare Counties who filed this
18 action have a right to have their claims under federal law heard in this Court. Their choice to
19 litigate in Fresno places a heavy burden on defendant's attempt to move the case elsewhere. *Cf.*
20 *In re Peachtree Lane Assocs., Ltd.*, 150 F.3d 788, 794 (7th Cir. 1998) (holding that venue is
21 presumed to be proper where filed, and the party challenging venue bears the burden of proving
22 that venue is improper); *Myers v. American Dental Ass'n*, 695 F.2d 716, 724 (3d Cir. 1982)
23 (same). If this case were transferred, the dealer plaintiffs would be forced to travel to
24 Sacramento in order to provide testimony on the impact of the greenhouse gas rule on their
25 businesses -- testimony that may well be required here, given defendant's refusal to acknowledge
26 the near-term impact of the CARB rule on those businesses.

27 Defendant has not shown or even attempted to show that she will suffer any
28 inconvenience from litigating in Fresno, where the first CARB fuel economy standards were

1 challenged in 2002, and where she is currently defending the 2004 CARB regulation in State
2 court. (*See* p. 4 n. 4 above and p. 53 n. 51 below.) CARB conducts its affairs on a Statewide
3 basis; indeed, CARB selected Fresno as the venue for one of its public meetings to examine the
4 greenhouse gas rule prior to the Board’s September 2004 hearing.⁴³

5 With no prospect of showing unfairness or inconvenience, defendant instead tries to oust
6 plaintiffs from this forum by deploying principles that were developed under a now-discarded
7 version of the federal venue statute, which she claims should control this Court’s construction of
8 Local Rule 3-120(d). Defendant’s construction of Local Rule 3-120(d) would make it *illegal* for
9 local businesses to sue an officer of the State of California in this courthouse. She states no
10 public purpose that would be served by her transfer motion, and it has no legal or practical merit.

11 **A. Defendant’s Objection To Trial In Fresno Relies On Outdated Doctrine**
12 **Under A Repealed Venue Statute.**

13 Local Rule 3-120(d)) provides that all actions “cognizable by the United States District
14 Court for the Eastern District of California arising in Calaveras, Fresno, Inyo, Kern, Kings,
15 Madera, Mariposa, Merced, Stanislaus, Tulare and Tuolumne counties shall be commenced in
16 the United States District Court sitting in Fresno, California,” whereas cases “arising in”
17 Sacramento, among other places, “shall be commenced in Sacramento, California.” E.D. Cal.
18 L.R. 3-120(d). Defendant argues that the Local Rule’s use of the phrase “arising in” is a
19 throwback to the repealed federal venue statute and the tests for venue that courts applied from
20 it. According to defendant, “[t]his body of precedent should guide this Court’s interpretation of
21 its intra-district venue local rule, for it utilizes the same language, deals with the same topic
22 (venue), and was initially adopted at the same time.” (Mem. at 13.)

23 Defendant ignores the case most on point in the current situation -- this Court’s decision
24 on a similar motion in the *Central Valley Chrysler-Plymouth* case in 2002.⁴⁴ Her new-found

25 ⁴³ *See* Dana Decl. ¶ 5 and Plaintiffs’ RJN Exh. 8.

26 ⁴⁴ *See Central Valley Chrysler-Plymouth*, Order Granting in Part and Denying in Part
27 Defendants’ Motion to Dismiss and Scheduling Oral Argument in Connection with Plaintiffs’
28 Motion for Preliminary Injunction, Apr. 5, 1002, at 26-27, in Plaintiffs’ RJN Exh. 9 (hereinafter
“Venue Order”).

1 reasoning would saddle the Eastern District with precisely the same problems that led to the old
2 venue statute’s repeal. Prior to 1990, the general venue statute provided that federal question
3 cases could only be brought in the judicial district where the defendants resided or “in which the
4 claim arose.” 28 U.S.C. § 1391(b) (1990). This language proved to be “litigation breeding,”
5 H.R. Rep. No. 101-734, at 23 (1990), giving rise to “a plethora of tests to determine the *single*
6 venue in which the claim ‘arose.’” *Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 42 (1st
7 Cir. 2001) (emphasis added). As a result Congress amended the statute in 1990 to its current
8 form, which provides for venue in any judicial district “in which a substantial part of the events
9 or omissions giving rise to the claim occurred.” 28 U.S.C. § 1391(b) (2004). Congress’s intent
10 in amending the statute was to “provide more options to those bringing suit” and to “avoid
11 wasteful litigation” in choosing venue. *See Moore*, Federal Practice 3d §§ 110.02[2][c],
12 110.04[1] (2001). Thus, it is now clear that venue can properly lie in more than one forum as
13 “there can be more than one district [here, division] in which a substantial part of the events
14 giving rise to the claim occurred.” Wright & Miller, FEDERAL PRACTICE & PROCEDURE § 3806
15 (2004 pocket part). This Court so held in the *Central Valley Chrysler-Plymouth* litigation.⁴⁵

16 Treating the issue raised by defendant as one of venue, the new federal venue statute and
17 the decisions interpreting it should once again guide this Court’s interpretation of Local Rule
18 3-120(d). Defendant has not cited a single case postdating the 1990 amendment (and plaintiffs
19 are aware of none) that departs from § 1391’s substantial-connection standard in construing local
20 venue rules. Rather, courts have uniformly adhered to that standard in assessing whether

21 _____
22 ⁴⁵ As the Court held in its prior construction of Local Rule 3-120(d):

23 the convenience to these [dealer] plaintiffs is a relevant factor. The court further
24 notes that defendants participate in regulatory administrative proceedings and
litigation in various locations in the State of California as a routine matter.

25 *Central Valley Chrysler-Plymouth*, Venue Order at 27, in Plaintiffs’ RJN Exh. 9 at 27. The same
26 factors are present in this case. The defendant in this case occupies the same office as the
27 defendant in the *Central Valley Chrysler-Plymouth* litigation, and the rulemaking challenged
28 here was the product of numerous public meetings around the State culminating in a formal
hearing in Los Angeles. *See Dana Decl.* ¶ 3.

1 divisional venue is proper. *See, e.g.*, N.D. Cal. L.R. 3-2(c) (divisional venue is determined by
2 where the claim “arises,” which means “the county in which a substantial part of the events or
3 omissions which give rise to the claim occurred”); *see also Atmel Corp. v. St. Paul Fire &*
4 *Marine Ins. Co.*, No. C 04-04082, 2005 WL 289971 (N.D. Cal. Feb. 4, 2005) (denying motion
5 for intradistrict transfer from San Francisco to San Jose because “the activities that occurred in
6 San Francisco constitute[d] a substantial part of the events and omissions that directly gave rise
7 to plaintiff’s claim”).

8 **B. Defendant’s Interpretation Of Local Rule 3-120(d) Would Conflict with**
9 **Paramount Federal Law And Produce Absurd Results.**

10 Putting to one side the problems under the old venue statute, the Judicial Code and Civil
11 Rule 83 give the Court no option but to interpret the Local Rule so it does not conflict with the
12 current § 1391. The power of federal courts to adopt local rules is derived from Fed. R. Civ. P.
13 83, which states, “A local rule shall be consistent with -- but not duplicative of -- Acts of
14 Congress.” The Judicial Code similarly requires that all Local Rules “be consistent with Acts of
15 Congress and rules of practice and procedure prescribed” by the Supreme Court. 28 U.S.C.
16 § 2071(a); *see also* E.D. Cal. L.R. 1-100(c) (the Local Rules “are intended to supplement and
17 shall be construed and administered consistently with and subordinately to the Federal Rules of
18 Civil Procedure”).

19 The relevant “Acts of Congress” obviously include the Judicial Code, and specifically
20 § 1391. The policies that animate the modern Judicial Code and the Civil Rules, as well as the
21 specific letter of the Code and the Civil Rules, are paramount: “[L]ocal rules must not impede
22 the policies behind statutes as well as avoiding outright contradiction.” *Gerritsen v. Escobar y*
23 *Cordova*, 688 F. Supp. 556, 558 (C.D. Cal. 1988) (collecting cases). Thus, in numerous different
24 settings, when parties or courts have sought to apply Local Rules in ways that reached results
25 different from Title 28 or the Civil Rules, they have been rebuffed. *See, e.g., Carver v. Bunch*,
26 946 F.2d 451, 453-54 (6th Cir. 1991); *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*,
27 922 F.2d 168, 174-75 (3d Cir. 1990); *Holloway v. Lockhart*, 813 F.2d 874, 880 (8th Cir. 1987);

1 *Williams v. United States District Court*, 658 F.2d 430, 434-37 (6th Cir. 1981); *McCargo v.*
2 *Hedrick*, 545 F.2d 393, 402 (4th Cir. 1976).

3 Defendant's construction of Local Rule 3-120(d) would lead straight into the type of
4 conflict with general federal practice that Rule 83 and 28 U.S.C. § 2071(a) do not permit.
5 Defendant would read Local Rule 3-120(d) to mean that "harm is not a basis for deciding where
6 a claim 'arose.'" But it is well-settled that, under § 1391, "to establish a substantial connection
7 to the claim, it is generally sufficient to demonstrate that injury or loss alleged in the lawsuit
8 occurred in the chosen venue." *Bay County Democratic Party v. Land*, 340 F. Supp. 2d 802, 809
9 (E.D. Mich. 2004) (citing *Uffner*, 244 F.3d at 41-43); *see also Myers v. Bennett Law Offices*, 238
10 F.3d 1068, 1076 (9th Cir. 2001) (finding that "a substantial part of the events giving rise to the
11 claim occurred" in the district where the harm was felt). Defendant cannot on the one hand try
12 to frame the issue she raises under Local Rule 3-120(d) as an issue to be determined under
13 general federal venue doctrine, and then insist on a result at odds with that doctrine.

14 Defendant's position leads to absurd results. If, for example, a regulation were adopted
15 in and enforced solely by State officials based in Los Angeles, venue could still be laid in this
16 District under § 1391 so long as substantial effects of the regulation were felt within the District
17 (whether it be in the Fresno or Sacramento Division). *See, e.g., Bay County Democratic Party*,
18 340 F. Supp. 2d at 809 (venue proper in district where effects of challenged law are felt, even if
19 the law was enacted elsewhere); *accord McClure v. Manchin*, 301 F. Supp. 2d 564, 569 (N.D.
20 W. Va. 2003); *Emison v. Catalano*, 951 F. Supp. 714, 721 (E.D. Tenn. 1996); *School Dist. of*
21 *Phila. v. Pennsylvania Milk Mktg. Bd.*, 877 F. Supp. 245, 249 (E.D. Pa. 1995); *Farmland Dairies*
22 *v. McGuire*, 771 F. Supp. 80, 82 (S.D.N.Y. 1991). But under defendant's interpretation of Local
23 Rule 3-120(d), **divisional** venue could not lie in **either** Fresno or Sacramento—even though
24 venue would be proper in the District as a whole—because "harm is not a basis for deciding
25 where a claim 'arose.'" (Mem. at 14.) Defendant's proposed rule would thus squarely conflict
26 with § 1391, as defendant's interpretation would allow the Local Rule to defeat proper venue in
27 the District as a whole.

1 Defendant's position would also seemingly mean that a plaintiff could challenge the
2 CARB regulations anywhere in California where harm occurred (because § 1391 would permit
3 such venue), except in Fresno (because defendant's interpretation of Local Rule 3-120(d) would
4 preclude such divisional venue). Local Rule 3-120(d) should not be construed so as to lead to
5 such an anomalous result. Rather, the only sensible reading—and indeed, the only reading
6 “consistent with Acts of Congress”—is the one adopted by this Court in *Central Valley*
7 *Chrysler-Plymouth*, which keeps the Local Rule consistent with current § 1391.

8 Defendant bases her contrary views on two cases that her predecessor did not brief in
9 *Central Valley Chrysler-Plymouth: Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979),
10 and *District No. 1, Pac. Coast Dist. v. Alaska*, 682 F.2d 797, 798-99 (9th Cir. 1982). But merely
11 to state the facts of those cases is sufficient to demonstrate why they do not apply here. In *Leroy*
12 the Supreme Court held that a Texas-based corporation seeking to challenge an Idaho takeover
13 statute could only bring suit in Idaho, even if the effects of the statute might be felt in Texas.
14 This decision was based on three primary considerations: (1) the Idaho officials would be
15 inconvenienced by having to litigate in Texas, *Leroy*, 443 U.S. at 185-86; (2) “federal judges
16 sitting in Idaho are better qualified to construe Idaho law, and to assess the character of Idaho's
17 probable enforcement of that law, than are judges sitting elsewhere,” *id.* at 186; and (3) if venue
18 was found to be proper in Texas because the effects of the law were felt there, the Idaho officials
19 would be subject “to suit in almost every district in the country,” *id.*

20 Defendant acknowledges that the underlying “context” for the *Leroy* Court's decision
21 was ““to protect the defendant against the risk that a plaintiff will seek an unfair or inconvenient
22 place of trial.”” Mem. at 14 (emphasis and citation omitted). But in this case, defendant makes
23 no claim of inconvenience or unfairness, nor could she. California's own venue rules provide
24 that the State or any agency of the State may be sued in any city or county in which the Attorney
25 General has an office. Cal. Civ. Proc. Code § 401. This rule reflects “a determination by the
26 California legislature that its state agencies will not be unduly inconvenienced if required to
27 defend actions away from Sacramento, in locations where the Attorney General is officed.”
28 *Straus Family Creamery v. Lyons*, 219 F. Supp. 2d 1046, 1048 (N.D. Cal. 2002).

1 Requiring defendant to litigate in Fresno -- where the Attorney General maintains an
2 office and which is a only a few hours by car from Sacramento -- is simply not comparable to
3 subjecting Idaho officials to a suit in Texas. Similarly, *Leroy*'s concern regarding the courts'
4 relative competence to construe local law is not applicable. As for *Leroy*'s concerns about
5 subjecting the State "to suit in almost every district in the country," *Leroy*, 443 U.S. at 186,
6 interpreting Local Rule 3-120(d) to permit suit in Fresno when suit is already appropriate in the
7 Eastern District of California obviously does not throw open courthouse doors in any other
8 district, as § 1391 still controls the propriety of venue in those other districts. *Cf.* Mem. at 16.

9 The decision in *District No. 1* is equally irrelevant. There, the Ninth Circuit held that a
10 challenge to an Alaska statute could not be brought in Washington because the Alaska state
11 defendants would be inconvenienced, and because "it would be preferable for a federal judge in
12 Alaska to decide [the] claims rather than for one in Washington to do so." *Dist. No. 1*, 682 F.2d
13 at 798. Significantly, the court expressly distinguished cases "involv[ing] districts in only one
14 state," reasoning that in those situations "the concern in *Leroy* that federal judges in a state are
15 better suited to rule on that state's statutes than are judges elsewhere was inapplicable." *Id.* at
16 799. The reasoning in *District No. 1* thus makes it inapplicable to an issue of intra-district venue
17 like the one raised by defendant here.

18 **C. This Case Is Properly Heard In Fresno.**

19 Under the substantial-connection standard of § 1391(b), venue in the Fresno Division is
20 proper. As mentioned, numerous courts have held that, to establish venue under § 1391(b), "it is
21 generally sufficient to demonstrate that injury or loss alleged in the lawsuit occurred in the
22 chosen venue." *Bay County*, 340 F. Supp. 2d at 809. Treating the issue as a venue question,
23 venue is properly laid in Fresno because the plaintiffs in Fresno, Stanislaus, and Tulare Counties
24 have suffered, and will continue to suffer, significant injury there due to CARB's regulation.

25 Contrary to defendant's representations, immediate harm is not a requirement for venue.
26 Venue can be based on imminent harm. For example, in *Emison v. Catalano*, which involved an
27 action to enjoin enforcement of a new state election statute, the court found that venue was
28

1 properly laid in the district where enforcement of the statute “*would* affect” the plaintiff. 951 F.
2 Supp. at 721 (emphasis added); *see also Bay County*, 340 F. Supp. 2d at 808 (rejecting
3 defendants’ argument that “no part of the claim ... occurred in this district since ... no injury has
4 occurred”).

5 Nevertheless, there is clear evidence that the regulation has already caused injury here.
6 As they explain in their declarations, the dealer plaintiffs have already been alerted to severe
7 future curtailments in their product lines.⁴⁶ This is confirmed in the affected manufacturers’
8 government disclosure forms, which affirm that if the California rule goes into effect, they will
9 lose sales, will be forced to restrict product lines, and will suffer various adverse economic
10 effects.⁴⁷ For the members in the industry who are in the front lines of the struggle to remain
11 competitive -- the retail automotive dealers -- the loss in future sales directly translates into a
12 diminution in the present value of their businesses. As the analysis by an independent expert
13 shows, the *current* losses for the dealers whose businesses he studied range from \$140,000 to
14 more than \$1.7 million, when evaluated on a conservative basis.⁴⁸ There can be no doubt that
15 businesses on the scale of the dealer plaintiffs in this action have experienced a substantial loss
16 in the value of their businesses.⁴⁹

17 There also can be no suggestion that litigation here would be improper or illegal under
18 the Local Rules merely because Sacramento has a substantial connection to the claims. Courts
19

20 ⁴⁶ *See* Beck Decl. ¶ 8; Pistorresi Decl. ¶ 8; Gardner Decl. ¶ 10; Harrington Decl. ¶ 7; Wells Decl.
21 ¶ 10.

22 ⁴⁷ *See* notes 16-18 above.

23 ⁴⁸ *See* Hardin Decl. ¶¶ 7-9 and pp. 12-15 above.

24 ⁴⁹ In this respect CARB’s regulation operates like a “taking,” similar to a zoning regulation or
25 another restriction that diminishes property or business value. *Cf. Tahoe-Sierra Pres. Council,*
26 *Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 355-56 (2002) (Thomas, J., dissenting) (“No
27 one seriously doubts that the land-use regulations at issue rendered petitioners’ land
28 unsusceptible of any economically beneficial use. . . . These individuals and families were
deprived of the opportunity to build single-family homes as permanent, retirement, or vacation
residences on land upon which such construction was authorized when purchased.”).

1 “no longer ask which district [here, division] among two or more potential forums is the ‘best’
2 venue.... Rather, [they] ask whether the district the plaintiff chose had a substantial contact to
3 the claim, whether or not other forums had greater contacts.” *Setco Ents. Corp. v. Robbins*, 19
4 F.3d 1278, 1281 (8th Cir. 1994); *see also McClure v. Manchin*, 301 F. Supp. 2d 564, 569 (N.D.
5 W. Va. 2003) (“[P]roper venues are not mutually exclusive. Indeed, venue is subject to the
6 choice of the plaintiffs, not the defendant.”). The rule challenged in this action was approved by
7 CARB at a hearing in Los Angeles. The declaration filed by defendant with her motion comes
8 from a CARB official who is based, along with most of the CARB motor vehicle regulatory
9 staff, in Los Angeles County.⁵⁰ The occurrence of some regulatory activity in Sacramento does
10 not change the fact that automobile dealers in Fresno, Stanislaus, and Tulare Counties are
11 harmed by CARB’s regulation.⁵¹

12 The decision in *School District of Philadelphia v. Pennsylvania Milk Marketing Board*,
13 877 F. Supp. 245 (E.D. Pa. 1995), is instructive in this regard. There, plaintiffs brought suit in

14 ⁵⁰ *See* Dana Decl. ¶¶ 3-4.

15 ⁵¹ Defendant is not moving for transfer of venue on grounds of inconvenience under 28 U.S.C.
16 § 1404(a). (*See* Mem. at 12.) Defendant would have no grounds for such a motion. The Ninth
17 Circuit has held that the defendant “must make a strong showing of inconvenience to warrant
18 upsetting the plaintiff’s choice of forum.” *Decker Coal Co. v. Commonwealth Edison Co.*, 805
19 F.2d 834, 843 (9th Cir. 1986). As discussed above, defendant in this case has no plausible claim
20 of inconvenience given that the Attorney General maintains an office in Fresno and the State is
21 currently defending a state-court suit in Fresno that involves the same regulation. (*See* p. 4, n. 4
22 above; Plaintiffs’ RJN Exh. 16.) Moreover, transfer is not appropriate where it “would merely
23 shift rather than eliminate the inconvenience.” *Id.* at 843; *accord Shropshire v. Fred Rappoport*
24 *Co.*, 294 F. Supp. 2d 1085, 1095 (N.D. Cal. 2003); *Straus Family Creamery v. Lyons*, 219 F.
25 Supp. 2d 1046, 1047 (N.D. Cal. 2002). Here, transferring the case to Sacramento would
26 inconvenience the witnesses who reside in Fresno. Additionally, where, as here, the transferee
27 and transferor forums are close in distance, courts have routinely found change of venue to be
28 not appropriate. *E.g.*, *Rodolff v. Provident Life & Accident Ins. Co.*, No. 01-CV-0768H, 2001
WL 34083814, at *4 (S.D. Cal. Aug. 23, 2001) (“the distance between Los Angeles and San
Diego is minimal in this age of automobiles and airplanes,” and so the “difference in the cost of
litigating in either district and in the convenience for the parties and witnesses is marginal”);
Jarvis Christian College v. Exxon Corp., 845 F.2d 523, 528 (5th Cir. 1988) (“The minor
inconvenience Exxon may suffer in having to litigate this case in Tyler—only 203 miles
distant—rather than in Houston, can in no rational way support the notion of abuse of
discretion.”).

1 the Eastern District of Pennsylvania, challenging certain actions taken by a state agency. The
2 defendants claimed that venue was improper because the agency and the capital were located in
3 the Middle District; “only the *impact* of acts taken within the Middle District [were] felt in the
4 Eastern District”; and “[i]mpact ... is insufficient to vest venue.” *Id.* at 249 (emphasis in
5 original). The court disagreed, however, holding that venue was properly laid in the Eastern
6 District because the effects of the agency’s acts were felt there. The defendants’ argument, the
7 court reasoned, “ignore[d] the fact that under the 1990 Amendments to [§ 1391], a case need not
8 be tried in the *best* place, but merely a place with substantial contacts.” *Id.* (emphasis in
9 original); *see also Farmland Dairies v. McGuire*, 771 F. Supp. 80, 82 (S.D.N.Y. 1991) (venue is
10 proper in district where impact of agency’s decision is felt). For the dealer plaintiffs, the Fresno
11 area is the locus not only of “substantial contacts” in the form of regulatory impact; it is for the
12 most part the *only* place where they do business, and where all the effects of the CARB rule on
13 them are occurring.

14 Similarly, in *Bay County*, the court rejected the state defendants’ argument that a
15 challenge to a provisional ballot procedure could only be brought in the district where the
16 election directives were drafted. According to the court the “defendants’ argument that
17 Michigan’s secretary of state performs her official duties only in Lansing, Michigan and
18 therefore may be sued only there [did] not withstand even the basest analysis.” *Bay County*, 340
19 F. Supp. 2d at 806. Rather, “[i]n cases involving state officials, a substantial connection to the
20 claim occurs not only where the ‘triggering event’ takes place, but also *where the effects of the*
21 *decision are felt.*” *Id.* at 809 (emphasis added). Thus, because the effects of the election
22 directive were felt statewide, the court held that venue was properly laid in the county where one
23 of the plaintiffs was located. *Id.*; *see also McClure*, 301 F. Supp. 2d at 569 (venue proper in
24 district where effects of challenged statute are felt even though statute was enacted elsewhere);
25 *Emison*, 951 F. Supp. at 721 (same); *cf. Myers*, 238 F.3d at 1076 (finding in tort action that “a
26 substantial part of the events giving rise to the claim occurred in Nevada,” where “one of the
27 ‘harms’ suffered by Plaintiffs ... was felt in Nevada”); *Uffner*, 244 F.3d at 43 (concluding that,

1 “in a suit against an insurance company to recover for losses ..., the jurisdiction where that loss
2 occurred is ‘substantial’ for venue purposes”).

3 For all these reasons this case was properly filed in Fresno and should be litigated here.
4

5 **CONCLUSION**

6 Based upon the foregoing, defendant’s motion to dismiss or transfer this action should be
7 denied. Plaintiffs respectfully request that, in addition to holding a hearing on the motion, the
8 Court permit oral testimony on any issues that the Court considers material to the motion and
9 that the Court is not prepared to resolve by denying the motion based on the documentary
10 evidence.
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13 Dated: May 2, 2005

Respectfully submitted,

14 _____
15 /s/
16 Timothy Jones
17 Attorney for all Plaintiffs
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