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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA  
FRESNO DIVISION

**CENTRAL VALLEY CHRYSLER-JEEP,  
INC.; et al.,**  
  
Plaintiffs,  
  
v.  
  
**CATHERINE E. WITHERSPOON,**  
  
Defendant.

NO. CIV F-04-6663 REC LJO  
  
**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT'S MOTION TO  
DISMISS PLAINTIFFS' FIRST  
AMENDED COMPLAINT**  
  
[Fed. R. Civ. P. 12(b)(1), (b)(3), (b)(6)]  
  
Hearing: June 13, 2005  
Time: 1:30 p.m.  
Courtroom: One  
Judge: Hon. Robert E. Coyle

**TABLE OF CONTENTS**

	<u>Page</u>
1 INTRODUCTION	1
2 STATUTORY BACKGROUND	3
3       California’s Authority Under the Clean Air Act	3
4       Assembly Bill 1493	5
5       California’s Administrative Procedure Act Process	6
6 STATEMENT OF FACTS	7
7 ARGUMENT	10
8 I.     VENUE IS IMPROPER IN THE FRESNO DIVISION OF THIS COURT, AND	
9       THIS CASE SHOULD BE TRANSFERRED TO THE SACRAMENTO	
10       DIVISION.	11
11       A.     Intra-district Venue is Proper Only If the Claims “Arose” in this Division.	12
12       B.     Harm is Not a Basis for Deciding Where a Claim “Arose,” and So Intra-	
13             district Venue Is Proper Only Where Defendant Witherspoon’s Acts Have	
14             Occurred.	14
15       C.     Even if Harm Were Part of the Calculus for Intra-district Venue, No	
16             Harm Has Occurred in the Fresno Division.	16
17       D.     Even If Harm and Future Acts Were Part of the Calculus for Intra-district	
Venue, Substantial Acts Still Will Not Occur Within the Fresno Division.	18
18 II.    THIS CASE IS NOT RIPE BECAUSE CALIFORNIA HAS NOT TAKEN	
19       FINAL ACTION TO ADOPT THESE REGULATORY AMENDMENTS, AND	
FOR OTHER REASONS.	19
20       A.     There is No Final Administrative Decision to Challenge, and Thus	
Plaintiffs’ Claims are Not Fit for Review.	21
21       B.     Analysis of the Legal Issues in this Case Should Await a Decision in	
22 <i>Commonwealth of Massachusetts v. United States Environmental</i>	
<i>Protection Agency.</i>	24
23       C.     Some Claims in Plaintiffs’ Amended Complaint Raise Factual Issues That	
24             Depend on Future Events, Making Those Claims Even Less Fit for	
Review.	27
25       D.     There is No Significant Hardship to Plaintiffs if this Case is Delayed a	
26             Few Months.	30
27 III.   THE PRIMARY JURISDICTION DOCTRINE CALLS FOR DISMISSAL OF	
28       PLAINTIFFS’ SECOND CLAIM.	35
CONCLUSION	39

**TABLE OF AUTHORITIES**

	<u>Pages</u>
<b>Cases</b>	
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	<i>passim</i>
<i>Airola v. King</i> , 505 F.Supp. 30 (D. Az. 1980)	11
<i>Anchorage v. United States</i> , 980 F.2d 1320 (9th Cir. 1992)	<i>passim</i>
<i>Arrow Transp. Co. v. Southern Ry.</i> , 372 U.S. 658 (1963)	35, 36
<i>Assiniboine &amp; Sioux Tribes v. Board of Oil &amp; Gas Conservation</i> , 792 F.2d 782 (9th Cir. 1986)	22
<i>Association of Am. Med. Colls. v. United States</i> , 217 F.3d 770 (9th Cir. 2000)	<i>passim</i>
<i>Auburn v. Qwest Corp.</i> , 260 F.3d 1160 (8th Cir. 2001)	22
<i>Barclays Bank PLC v. Franchise Tax Bd.</i> , 512 U.S. 298 (1994)	25
<i>Cahill v. Liberty Mutual Ins. Co.</i> , 80 F.3d 336 (9th Cir. 1996)	10
<i>Carolina Casualty Co. v. Data Broadcasting Corp.</i> , 158 F.Supp. 2d 1044 (N.D. Cal. 2001)	11
<i>Chavez v. Director, Office of Workers Comp. Programs</i> , 61 F.2d 1409 (9th Cir. 1992)	30, 31
<i>Chevron U.S.A., Inc. v. Hammond</i> , 726 F.2d 483 (9th Cir. 1984)	28
<i>Commercial Lighting Prods., Inc. v. United States Dist. Court</i> , 537 F.2d 1078 (9th Cir. 1976)	13
<i>Copperweld Corp. v. Independence Tube Corp.</i> , 467 U.S. 752 (1984)	29
<i>Decker Coal Co. v. Commonwealth Edison Co.</i> , 805 F.2d 834 (9th Cir. 1986)	12, 17
<i>District No. 1 v. Alaska</i> , 682 F.2d 797 (9th Cir. 1982)	11, 14, 15
<i>Duke Power Co. v. Carolina Env'tl. Study Group, Inc.</i> , 438 U.S. 59 (1978)	27
<i>Engine Mfrs. Ass'n v. United States Env'tl. Prot. Agency</i> , 88 F.3d 1075 (D.C. Cir. 1996)	3
<i>Ernst &amp; Young v. Depositors Economic Prot. Corp.</i> , 45 F.3d 530 (1st Cir. 1995)	31
<i>Ford Motor Co. v. Environmental Prot. Agency</i> , 606 F.2d 1293 (D.C. Cir. 1979)	3, 4
<i>Idaho v. Coeur D'Aene Tribe</i> , 521 U.S. 261 (1997)	17
<i>Immigrant Assistance Project v. Immigration &amp; Naturalization Serv.</i> 306 F.3d 842 (9th Cir. 2002)	18
<i>Kennecott Copper Corp. v. Costle</i> , 572 F.2d 1349 (9th Cir. 1978)	36

TABLE OF AUTHORITIES (CON'T)

	<u>Pages</u>
<b>Cases (con't)</b>	
<i>Kokkonen v. Guardian Life Ins. Co.</i> , 511 U.S. 375 (1994)	10, 23
<i>Koresko v. RealNetworks, Inc.</i> , 291 F.Supp.2d 1157 (E.D.Cal. 2003)	11
<i>Landis v. North Am. Co.</i> , 299 U.S. 248 (1936)	35
<i>Lee v. Oregon</i> , 107 F.3d 1382 (9th Cir. 1997)	19, 20
<i>Leroy v. Great Western United Corporation</i> , 443 U.S. 173 (1979)	11, 14, 15
<i>Lujan v. National Wildlife Fed.</i> , 497 U.S. 871 (1990)	21
<i>Morton v. Mancari</i> , 417 U.S. 535 (1974)	25
<i>Motor &amp; Equip. Mfrs. Ass'n v. Environmental Prot. Agency</i> , 627 F.2d 1095 (D.C. Cir. 1979)	<i>passim</i>
<i>Motor &amp; Equip. Mfrs. Ass'n v. Nichols</i> , 142 F.3d 449 (D.C. Cir. 1998)	<i>passim</i>
<i>Motor Vehicle Mfrs. Ass'n v. New York St. Dep't of Env'tl. Cons.</i> , 17 F.3d 521, 525 (2nd Cir. 1994)	4
<i>Mt. Adams Veneer Co. v. United States</i> , 896 F.2d 339 (9th Cir. 1989)	21, 31
<i>National Distillers &amp; Chem. Corp. v. Department of Energy</i> , 487 F.Supp. 34 (D. Del. 1980)	18
<i>National Park Hospitality Ass'n v. Department of Interior</i> , 538 U.S. 803 (2003)	20
<i>New Orleans Public Serv., Inc. v. City of New Orleans</i> , 491 U.S. 350 (1989)	20
<i>Nissan Motor Co. v. Nissan Computer Corp.</i> , 158 F.Supp.2d 1154 (C.D. Cal. 2001)	11
<i>Ohio Forestry Ass'n v. Sierra Club</i> , 523 U.S. 726 (1998)	27
<i>Oxygenated Fuels Ass'n v. Davis</i> , 331 F.3d 665 (9th Cir. 2003)	3
<i>Oxygenated Fuels Ass'n, Inc. v. Davis</i> , 163 F.Supp.2d 1182 (E.D. Cal. 2001) <i>aff'd</i> 331 F.3d 665 (9th Cir. 2003)	26
<i>Pacific Gas &amp; Elec. Co. v. State Energy Resources Cons. &amp; Devel. Comm'n</i> , 461 U.S. 190 (1983)	27
<i>Pacific Northwest Venison Producers v. Smitch</i> , 20 F.3d (9th Cir. 1994)	28
<i>Phillips v. Baker</i> , 121 F.2d 752 (9th Cir. 1941)	12
<i>Piedmont Label Co. v. San Garden Packing Co.</i> , 598 F.2d 491 (9th Cir. 1979)	11
<i>Pike v. Bruce Church, Inc.</i> , 397 U.S. 137 (1970)	28

**TABLE OF AUTHORITIES (CON'T)**

	<u>Pages</u>
<b>Cases (con't)</b>	
<i>Prentis v. Atlantic Coast Line Co.</i> , 211 U.S. 210 (1908)	20
<i>Regional Rail Reorganization Act Cases</i> , 419 U.S. 102 (1974)	20
<i>Reiter v. Cooper</i> , 507 U.S. 258 (1993)	36, 38
<i>Rilling v. Burlington N.R.R.</i> , 909 F.2d 399 (9th Cir. 1990)	35, 36
<i>Rosenfeld v. S.F.C. Corp.</i> , 702 F.2d 282 (1st Cir. 1983)	13
<i>Semtek Int'l Inc. v. Lockheed Martin Corp.</i> , 531 U.S. 497 (2001)	39
<i>Sidco Indus. Inc. v. Wimar Tahoe Corp.</i> , 768 F.Supp. 1343 (D. Or. 1991)	18
<i>Sierra Club v. United States Nuclear Regulatory Comm'n</i> , 825 F.2d 1356 (9th Cir. 1987)	21
<i>Southern Pac. Transp. Co. v. City of Los Angeles</i> , 922 F.2d 498 (9th Cir. 1990)	21
<i>Sutain v. Shapiro &amp; Lieberman</i> , 678 F.2d 115 (9th Cir. 1982)	<i>passim</i>
<i>Texas v. United States</i> , 523 U.S. 296 (1998)	21
<i>Thomas v. Anchorage Equal Rights Comm'n</i> , 220 F.3d 1134 (9th Cir. 2000)	20
<i>Ukiah Valley Medical Ctr. v. Federal Trade Comm'n</i> , 911 F.2d 261 (9th Cir. 1990)	21
<i>United States v General Dynamics Corp.</i> , 828 F.2d 1356 (9th Cir. 1987)	35, 36
<i>United States v. Sioux</i> , 362 F.3d 1241 (9th Cir. 2004)	13
<i>United States v. Western Pac. R.R.</i> , 352 U.S. 59 (1956)	35, 36
<i>United States v. Yellow Freight Sys., Inc.</i> , 762 F.2d 737 (9th Cir. 1985)	35
<i>US West Communications v. MFS Intelenet, Inc.</i> , 193 F.3d 1112 (9th Cir. 1999)	20, 21
<i>Warren v. Fox Family Worldwide, Inc.</i> , 328 F.3d 1136 (9th Cir. 2003)	10, 23, 28
<b>Federal Statutes</b>	
28 United States Code	
§ 1391(b)(1)	11
§ 1404(a)	12
§ 1406(a)	12, 19
42 United States Code	
§ 7401(b)(1)	3
§ 7409(a)	8

**TABLE OF AUTHORITIES (CON'T)**

	<u>Pages</u>
<b>Federal Statutes (con't)</b>	
42 United States Code (con't)	
§ 7507	3
§ 7521	3, 24, 25, 28
§ 7521(a)	24
§ 7543	24, 25
§ 7543(b)	<i>passim</i>
§ 7543(b)(1)	4, 35, 37
§ 7543(e)(2)	3
§ 7545(c)(4)(B)	3
§ 7602(g)	24
§ 7602(k)	25
§ 7607(b)(1)	35, 38, 39
49 United States Code	
§ 32902(b)	29
§ 32902(c)	29
Act of June 25, 1948, ch. 646, 1948 U.S.C.C.A.N. 695, A90	13
Act of March 18, 1966, Pub. L. No. 89-372, 1966 U.S.C.C.A.N. (80 Stat. 75) 86	13
Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 311, 1990 U.S.C.C.A.N. (104 Stat.) 5088	13
Act of November 2, 1996, Pub. L. No. 89-714, 1966 U.S.C.C.A.N. (80 Stat. 1111) 1300	13
<b>Federal Regulations</b>	
49 Code of Federal Regulations	
§ 533.5(a)	29
California State Motor Vehicle Pollution Control Standards - Waiver of Federal Preemption, 40 Fed. Reg. 30311 (1975)	32
California State Motor Vehicle Pollution Control Standards - Waiver of Federal Preemption, Decision, 57 Fed. Reg. 24788 (1992)	38
Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (2003)	24
Reforming the Automobile Fuel Economy Standards Program, 68 Fed. Reg. 74908 (2003)	29, 30

TABLE OF AUTHORITIES (CON'T)

		<u>Pages</u>
3	<b>Federal Rules</b>	
4	Federal Rules of Civil Procedure	
	Rule 12(b)	2
5	Rule 12(b)(3)	10
	Rule 12(b)(6)	10
6	Local Rules of the Eastern District of California	
7	Rule 3-120(d)	11, 12
	Rule 3-120(f)	12
8		
9	<b>California Statutes</b>	
10	2002 Cal. Stat. ch. 200	5
	§ 1(a)	5
11	§ 1(b)	5
	§ 1(c)	5
12	§ 1(d)	5
	§ 1(e)	5
13	§ 1(f)	5
	§ 1(g)	6
14	Government Code	
15	§§ 11340-61	6
	§ 11343	7, 23
16	§ 11343.4	7, 23
	§ 11346.2(a)	6
17	§ 11346.2(b)	6
	§ 11346.4(a)	6
18	§ 11346.4(b)	7, 34
	§ 11346.5(a)	6
19	§ 11346.8(a)	6
	§ 11346.8(c)	6
20		
	§ 11347.1	6
21	§ 11347.3(c)	7
	§ 11349	7, 23
22	§ 11349.1(a)	7, 23
	§ 11349.1(d)	23
23	§ 11349.3	23
	§ 11349.3(a)	7, 23, 34
24	Health and Safety Code	
25	§ 39601(a)	6
	§ 43018.5	5
26	§ 43018.5(a)	6
	§ 43018.5(b)(1)	6, 32
27	§ 43018.5(b)(2)(B)	32
	§ 43018.5(c)(1)	6
28	§ 43018.5(c)(2)	6
	§ 43018.5(c)(3)	6

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**TABLE OF AUTHORITIES (CON'T)**

	<u>Pages</u>
<b>California Statutes (con't)</b>	
Health and Safety Code (con't)	
§ 43018.5(c)(5)	6
§ 43018.5(d)	6
§ 43018.5(i)(2)	6
<b>Other Authorities</b>	
H.R. Rep. No. 94-340, <i>reprinted in</i> 1975 U.S.C.C.A.N. 1762 (1975 Energy Policy and Conservation Act)	25
H.R. Rep. No. 95-294 (1977), <i>reprinted at</i> 1977 U.S.C.C.A.N. 1077	4, 25, 37
H.R. Rep. No. 101-734, <i>reprinted in</i> 1990 U.S.C.C.A.N. 6802	13
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1 **INTRODUCTION**

2 California’s Air Resources Board has long been acknowledged as the leader in  
3 developing innovative technological solutions to air pollution problems. It has used its  
4 regulatory authority time and again – pursuant to California law and the unique authority granted  
5 to the State of California under the Clean Air Act – to take large and small steps to minimize the  
6 emissions from the millions of California motor vehicles.

7 With the blessing of the Governor and the Legislature, the Air Resources Board is  
8 now in the process of developing performance standards that would require automobile  
9 manufacturers, over the next 10 years or so, to reduce the average greenhouse gas emissions  
10 from motor vehicles sold in California. Greenhouse gas emissions contribute to the climate  
11 change phenomenon commonly known as global warming: a raising of the atmosphere’s  
12 temperature that is already having profound effects in California. These effects include rising  
13 sea levels, decreased snowpack and spring runoff, and more severe weather and wildfires.

14 The automobile manufacturing companies take the view that California should  
15 not adopt meaningful regulations to deal with this problem. Instead, they wish for California’s  
16 citizens to wait for either the federal government to act or for the technological breakthrough of a  
17 hydrogen powered automobile. Neither of these will happen any time soon, if at all. And so,  
18 with the proposed regulatory amendments being challenged in this action, California seeks to  
19 take its own steps towards a solution.

20 But the merits of California’s proposed regulatory amendments are not at issue at  
21 this stage, in this motion. Rather, this motion challenges the automobile manufacturers’ attempt  
22 to construct their challenge to these proposed regulatory amendments in order to bring this case  
23 at this place and at this time. Once one starts to look closely at the pieces of Plaintiffs’ amended  
24 complaint, this attempt fails.

25 Plaintiffs base venue in this Division on the harm they will allegedly suffer.  
26 However, the U.S. Supreme Court and the Ninth Circuit have held that the effects of a state law  
27 do not create venue in a case challenging that state law. Instead, intra-district venue is  
28 appropriate only where “a substantial part of the events occurred that gave rise to the claims.”

1 Within this District, this is only in Sacramento, where defendant Catherine E. Witherspoon (the  
2 Air Resources Board's Executive Officer, and the only Defendant in this action) has conducted  
3 her duties to develop these proposed regulatory amendments.

4           Plaintiffs bring this case now. Yet, they know that the challenged proposed  
5 regulatory amendments are not yet even finalized, but rather require several more steps to have  
6 the force of law. Under Ninth Circuit precedent, a state law must be at least final for a challenge  
7 to be ripe. Moreover, Plaintiffs' case relies on a pending decision in the U.S. Court of Appeals  
8 for the District of Columbia Circuit, Plaintiffs' case raises substantial factual issues that are  
9 dependent on future and not-yet-adopted federal regulations, and any potential hardship that  
10 would occur due to a delay of just a few months is speculative and limited. Thus, the Court does  
11 not have jurisdiction to hear this case now.

12           In their second claim, Plaintiffs seek a determination that these proposed  
13 regulatory amendments cannot meet the requirements of Clean Air Act section 209(b), by which  
14 California has authority to adopt motor vehicle emission standards. Under the primary  
15 jurisdiction doctrine, the courts defer to federal agencies on questions that Congress has  
16 delegated to those federal agencies. Clean Air Act section 209(b) is just such an example:  
17 Congress explicitly provided that that section's applicability is to be decided by the U.S.  
18 Environmental Protection Agency, with any appeal directly to the U.S. Court of Appeals. The  
19 Court should let that federal agency decide that question in the first instance, and dismiss this  
20 second claim.

21           Defendant Witherspoon brings this motion under Federal Rule of Civil Procedure  
22 12(b), to raise these venue and jurisdictional issues before the Court needs to address the  
23 complex legal and factual issues raised by the amended complaint. After explaining some of the  
24 relevant statutory background and outlining the challenged regulatory action, this brief will  
25 address each of these three issues in turn. Defendant Witherspoon respectfully requests that the  
26 Court dismiss this case in its entirety. Alternatively, defendant Witherspoon respectfully  
27 requests that the Court transfer this case to the Sacramento Division, stay this litigation, and  
28 dismiss the second claim.

1 **STATUTORY BACKGROUND**

2 California’s Authority Under the Clean Air Act

3 Congress enacted the Clean Air Act “to protect and enhance the quality of the  
4 Nation’s air resources so as to promote the public health and welfare and the productive capacity  
5 of its population.” 42 U.S.C. § 7401(b)(1). The Clean Air Act is an example of cooperative  
6 federalism, with responsibilities “shared between the federal government and state  
7 governments.” *Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665, 666 (9th Cir. 2003).

8 With a crucial exception, the Clean Air Act adopted a mostly federal program for  
9 controlling pollution emissions from automobiles, trucks, and other mobile sources. *Motor &*  
10 *Equip. Mfrs. Ass’n v. Nichols* (“*MEMA III*”), 142 F.3d 449, 452 (D.C. Cir. 1998). *See also* 42  
11 U.S.C. § 7521 (provisions related to federal motor vehicle emission standards). The crucial  
12 exception is California. California can adopt its own fuel regulations. *See* 42 U.S.C. §  
13 7545(c)(4)(B); *Oxygenated Fuels*, 331 F.3d 665. California can adopt its own non-road engine  
14 regulations. *See* 42 U.S.C. § 7543(e)(2); *Engine Mfrs. Ass’n v. United States Env’tl. Prot.*  
15 *Agency*, 88 F.3d 1075 (D.C. Cir. 1996). And California can adopt its own motor vehicle  
16 emission regulations, though its exercise of that power is challenged in this case.<sup>1</sup> *See* 42 U.S.C.  
17 § 7543(b); *Motor & Equip. Mfrs. Ass’n v. Environmental Prot. Agency* (“*MEMA I*”), 627 F.2d  
18 1095 (D.C. Cir. 1979). California’s authority for regulating motor vehicle emissions is found in  
19 Section 209(b) of the Clean Air Act, and is commonly referred to as the “waiver” provision.

20 Congress provided this special authority for California because it understood that  
21 California was the leader in developing technological strategies to address air pollution  
22 problems. *See Engine Mfrs.*, 88 F.3d at 1079-80. California had begun regulating automobile  
23 emissions in 1964, well before the federal government. *See id.* at 1079; *Ford Motor Co. v.*  
24 *Environmental Prot. Agency*, 606 F.2d 1293, 1294 n.1, 1295 (D.C. Cir. 1979). Congress was  
25 convinced that California could operate as “a kind of laboratory for innovation.” *See MEMA I*,  
26 627 F.2d at 1111 (quoted in *Engine Mfrs.*, 88 F.3d at 1080). And so, despite “the adamant

27 \_\_\_\_\_  
28 1. Other States may, in certain circumstances, adopt California’s standards, but they  
may not vary from those standards. *See* 42 U.S.C. § 7507.

1 objection of the auto industry,” Congress preserved California’s authority to develop its own  
2 program for regulating mobile source emissions. *Motor Vehicle Mfrs. Ass’n v. New York St.*  
3 *Dep’t of Env’tl. Cons.*, 17 F.3d 521, 525 (2nd Cir. 1994). In fact, Congress’s intent, in adopting  
4 the 1977 amendments to the Clean Air Act, was “to ratify and strengthen the California waiver  
5 provision and affirm the underlying intent of that provision, i.e., to afford California the broadest  
6 possible discretion in selecting the best means to protect the health of its citizens and the public  
7 welfare.” H.R. Rep. No. 95-294, at 301-302 (1977), *reprinted at* 1977 U.S.C.C.A.N. 1077,  
8 1380-81. As the U.S. Court of Appeals for the District of Columbia Circuit found long ago,

9           The history of congressional consideration of the California waiver provision,  
10           from its original enactment up through 1977, indicates that Congress intended the  
11           State to continue and expand its pioneering efforts at adopting and enforcing  
          motor vehicle emission standards different from and in large measure more  
          advanced than the corresponding federal program.

12 *MEMA I*, 627 F.2d at 1110-11. Thus, California was granted the “broadest possible discretion in  
13 adopting and enforcing standards for the control of emissions from new motor vehicles.” *Id.* at  
14 1128. *See also id.* at 1108 n.22, 1110 & n.31. “In short, Congress consciously chose to permit  
15 California to blaze its own trail with a minimum of federal oversight.” *Ford Motor Co.*, 606  
16 F.2d at 1297.

17           The only constraints on California’s authority to regulate motor vehicle emissions  
18 are that California must determine that its “standards will be, in the aggregate, at least as  
19 protective of public health and welfare as applicable Federal standards,” and that the  
20 Administrator of the U.S. Environmental Protection Agency can block California’s regulations if  
21 he finds that: “(A) the determination of the State is arbitrary and capricious, [¶] (B) such State  
22 does not need such State standards to meet compelling and extraordinary conditions, or [¶] (C)  
23 such State standards and accompanying enforcement procedures are not consistent with section  
24 7521(a) of this title.” 42 U.S.C. § 7543(b)(1). *See MEMA I*, 627 F.2d at 1128 (holding that this  
25 section *requires* the U.S. Environmental Protection Agency to waive preemption unless one of  
26 these criteria are met). “California’s waiver applications are almost always approved.” *Motor*  
27 *Vehicle Mfrs.*, 17 F.3d at 534.

28 \\\

1                   Assembly Bill 1493

2                   California Assembly Bill 1493, introduced by Assemblywoman Fran Pavley, is  
3 the latest innovation in California’s efforts to reduce motor vehicle emissions. This legislation  
4 was enacted in 2002, and adds section 43018.5 to California’s Health and Safety Code. *See* 2002  
5 Cal. Stat. ch. 200. Section 43018.5 requires the Air Resources Board to “develop and adopt  
6 regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas  
7 emissions from motor vehicles” and sets forth the process and criteria for that determination.  
8 Cal. Health & Safety Code § 43018.5.

9                   In enacting AB 1493, the California Legislature made several findings. The  
10 Legislature found global warming to be “a matter of increasing concern,” and that “[t]he control  
11 and reduction of emissions of greenhouse gases are critical to slow the effects of global  
12 warming.” 2002 Cal. Stat. ch. 200, § 1(a), (c). The Legislature summarized the “compelling and  
13 extraordinary impacts” that would occur specifically in California:

- 14                   (1) Potential reductions in the state’s water supply due to changes in the  
15                   snowpack levels in the Sierra Nevada Mountains and the timing of spring runoff.
- 16                   (2) Adverse health impacts from increases in air pollution that would be caused  
17                   by higher temperatures.
- 18                   (3) Adverse impacts upon agriculture and food production caused by projected  
19                   changes in the amount and consistency of water supplies and significant increases  
20                   in pestilence outbreaks.
- 21                   (4) Projected doubling of catastrophic wildfires due to faster and more intense  
22                   burning associated with drying vegetation.
- 23                   (5) Potential damage to the state’s extensive coastline and ocean ecosystems due  
24                   to the increase in storms and significant rise in sea level.
- 25                   (6) Significant impacts to consumers, businesses, and the economy of the state  
26                   due to increased costs of food and water, energy, insurance, and additional  
27                   environmental losses and demands upon the public health infrastructure.

28 *Id.* § 1(d). The Legislature understood California’s responsibility to address the motor vehicle  
sources that cause global warming, since California has the world’s fifth largest economy, motor  
vehicles account for 40 percent of greenhouse gases in California, and “California has a long  
history of being the first in the nation to take action to protect public health and the environment,  
and the federal government has permitted the state to take those actions.” *Id.* § 1(b), (e), (f). The

1 Legislature also recognized the economic opportunities that this effort would provide, as the  
2 required technology would “stimulate the California economy and provide enhanced job  
3 opportunities.” *Id.* § 1(g).

4           As mentioned above, AB 1493 requires the Air Resources Board to “develop and  
5 adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse  
6 gas emissions from motor vehicles.” Cal. Health & Safety Code § 43018.5(a). This level of  
7 reduction was specifically defined as the reduction “[c]apable of being successfully  
8 accomplished within the time provided by this section, taking into account environmental,  
9 economic, social, and technological factors” and “[e]conomical to an owner or operator of a  
10 vehicle, taking into account the full life-cycle costs of a vehicle.” *Id.* § 43018.5(i)(2).

11           The Legislature placed several additional limitations on the Air Resources  
12 Board’s authority to enact greenhouse gas emission regulations under AB 1493. The rules  
13 cannot be effective until January 1, 2006, and cannot apply until model year 2009. *Id.* §  
14 43018.5(b)(1). The Air Resources Board must consider technological feasibility and effects on  
15 California’s economy. *Id.* § 43018.5(c)(1), (c)(2). And the Air Resources Board must provide  
16 flexibility (including alternative methods of compliance) to those affected and grant credits for  
17 reductions achieved early. *Id.* § 43018.5(c)(3), (c)(5). The legislation also specifically rules out  
18 several approaches, including fees, taxes, bans of certain kinds of vehicles, and reductions in  
19 vehicle weight, speed, or miles traveled. *Id.* § 43018.5(d).

#### 20           California’s Administrative Procedure Act Process

21           The Air Resources Board’s regulations must be adopted in accordance with  
22 California’s Administrative Procedure Act. Cal. Health & Safety Code § 39601(a). That act sets  
23 forth the general requirements that all California administrative agencies must follow in adopting  
24 rules or regulations of general application. *See* Cal. Govt. Code §§ 11340-61. Included are  
25 requirements for the start of the rulemaking process (when notice of the proposal is given) (*see*  
26 *id.* §§ 11346.2(a), (b), 11346.4(a), 11346.5(a)); submission of comments (*see id.* § 11346.8(a));  
27 and revisions to the original proposal (*see id.* §§ 11346.8(c), 11347.1).

28           After hearing and adoption by the agency, the proposed regulations and the

1 rulemaking file must then be submitted to California’s Office of Administrative Law. *Id.* §§  
2 11343, 11347.3(c). This submission must occur within one year of the agency’s original notice  
3 (or the process must start anew). *Id.* § 11346.4(b). The Office of Administrative Law’s mandate  
4 is to review submitted regulations for necessity, authority, clarity, consistency, reference, and  
5 nonduplication. *Id.* § 11349.1(a). *See also id.* § 11349 (definitions of these terms). The Office  
6 of Administrative Law must approve or disapprove of a regulation within 30 working days after  
7 submission to it. *Id.* § 11349.3(a). If approved, the regulation is then filed with the Secretary of  
8 State. *Id.* Once filed, the regulations are then effective 30 days later, unless the statute specifies  
9 otherwise, the agency sets a later effective date, or the Office of Administrative Law allows an  
10 earlier effective date pursuant to an agency request. *Id.* § 11343.4. Of course, if the regulations  
11 do not become effective, they do not have the force of law.

### 12 **STATEMENT OF FACTS**

13 The Air Resources Board held a public hearing in September 2004, in Los  
14 Angeles, to consider the greenhouse gas emission regulatory amendments proposed by its staff  
15 that are challenged in this action. (First Amended Complaint (“FAC”) ¶ 8.) These proposed  
16 amendments to the Air Resources Board’s motor vehicle emission standards would address four  
17 greenhouse gases: carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons. (Request  
18 for Judicial Notice (“RJN”), Exh. C, at A-16 (§ 1961.1(e)(4)).) At that September 2004 meeting,  
19 the Air Resources Board adopted Resolution 04-28, which Plaintiffs attach to their amended  
20 complaint. (FAC ¶ 8. *See also* FAC, Exh. A (Resolution 04-28).)

21 The Air Resources Board’s resolution first catalogues its statutory authority and  
22 the procedural process that preceded the resolution’s adoption. (FAC, Exh. A, at 1-8.) Then, the  
23 resolution includes the Air Resources Board’s findings. (FAC, Exh. A, at 9-14.) The Air  
24 Resources Board found the science of climate change sound: “Over the past century the  
25 temperatures in the northern hemisphere have changed at a rate faster than at any other time over  
26 the last millennium, and that change is because human activities are altering the chemical  
27 composition of the atmosphere through the buildup of greenhouse gases and other pollutants.”  
28 (FAC, Exh. A, at 9.) The Air Resources Board found “no scientific uncertainty” on this point,

1 and cited the International Panel on Climate Change and the National Research Council for the  
2 proposition that “the global climate is changing at a rate unmatched in the past one thousand  
3 years.” (FAC, Exh. A, at 9.) The Air Resources Board found profound effects in California:

4 Over the last hundred years, average temperatures in California have increased  
5 0.7<sup>E</sup> F, sea levels have risen by three to eight inches, and spring run-off has  
6 decreased 12 percent. These observed and future changes are likely to have  
significant adverse effects on California’s water resources, many ecological  
systems, as well as on human health and the economy.

7 (FAC, Exh. A, at 9.)

8 The Air Resources Board also found that the greenhouse gas emission regulatory  
9 amendments proposed by its staff would met the state statutory requirements of technological  
10 feasibility and cost-effectiveness. (FAC, Exh. A, at 9-11.) Specifically, the Air Resources  
11 Board found that the required technology is currently available or soon-to-be available:

12 There is a near-term, or off-the-shelf, technology package in each of the vehicle  
13 classes evaluated (small and large car, minivan, small and large truck, including  
14 sport-utility vehicles) that results in a reduction of greenhouse gas emissions of at  
15 least 15 to 20 percent from baseline 2009 values. In addition, there is generally a  
near-term technology package in each of the vehicle classes that result in about a  
25 percent climate change emission reduction;

16 (FAC, Exh. A, at 10.) And the Air Resources Board found positive economic impacts, both to  
17 consumers – “the technology packages that provide the basis for the standard result in operating  
18 cost savings that exceed the initial capital cost, resulting in a net savings to the consumer over  
19 the lifecycle of the vehicle” – and to the State’s economy – “the net effect of the regulation is  
20 expected to be small but positive.” (FAC, Exh. A, at 11.) Lastly, the Air Resources Board found  
21 significant emission reductions would occur if it adopted these proposed regulatory amendments,  
22 both in terms of greenhouse gas emissions – 155,200 carbon-dioxide-equivalent<sup>2</sup> tons per day in  
23 2030 – and criteria pollutant<sup>3</sup> emissions – 4.6 tons per day of non-methane organic gases in 2030

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25 2. The term “carbon-dioxide-equivalent” includes both carbon dioxide and other  
26 greenhouse gases (such as methane). The other greenhouse gases are less pervasive than carbon  
dioxide, but more potent (and therefore weighted to reflect that difference in potency).

27 3. The term “criteria pollutant” refers to pollutants for which the U.S.  
28 Environmental Protection Agency has already set national primary or secondary ambient air  
quality standards. *See, e.g.*, 42 U.S.C. § 7409(a). These pollutants are already subject to specific  
controls, pursuant to the Clean Air Act, under federal and state law.

1 and 2.3 tons per day of oxides of nitrogen in 2030. (FAC, Exh. A, at 14.)

2           The regulatory text proposed by the Air Resources Board’s staff is attached to  
3 Resolution 04-28 (though not to Plaintiffs’ complaint or amended complaint). (*See* RJN, Exh.  
4 C.) These proposed regulatory amendments would set “fleet average” greenhouse gas emission  
5 levels for “passenger cars, light-duty trucks, and medium duty passenger vehicles that are  
6 produced and delivered for sale in California each model year by a large volume [automobile]  
7 manufacturer.” (RJN, Exh. C, at A-6 (§ 1961.1(a)(1)(A)).) These levels would begin in model  
8 year 2009, but would not be at their most stringent until model year 2016. (RJN, Exh. C, at A-7  
9 (§ 1961.1(a)(1)(A) (table)).) The calculations of fleet average emissions would be quite  
10 complicated, and involve calculations of carbon dioxide, nitrous oxide, methane, and direct and  
11 indirect air conditioning system emissions for vehicles with similar characteristics (including  
12 vehicles that run on alternative fuels, such as natural gas or ethanol), as well as the averaging of  
13 each of these vehicle test groups. (RJN, Exh. C, at A-7 to A-13, A-17, A-18 (§ 1961.1(a)(1)(B),  
14 (a)(2), (a)(3), (d), (e)).)

15           At the September 2004 hearing, though, the Air Resources Board did not actually  
16 adopt these proposed regulatory amendments in Resolution 04-28. Instead, all Resolution 04-28  
17 does, “subject to further environmental analysis, . . . is initiat[e] steps towards final adoption of”  
18 the proposed regulatory amendments. (FAC, Exh. A, at 14.) The Air Resources Board  
19 delegated the remaining steps (including adoption of the proposed regulatory amendments) to its  
20 Executive Officer, defendant Witherspoon. (FAC, Exh. A, at 14-15.) It is she is who will “take  
21 appropriate final action.” (FAC, Exh. A, at 15.) Plaintiffs’ amended complaint does not allege  
22 that she has done so, for the simple reason that she has not.

23           Despite there not being final regulatory amendments in place, Plaintiffs filed their  
24 complaint on December 7, 2004. An amended complaint was filed on February 16, 2005. The  
25 amended complaint, like the original complaint, alleges five claims challenging the validity of  
26 the Air Resources Board’s proposed regulatory amendments for greenhouse gas emissions. The  
27 first claim alleges preemption under the federal Energy Policy and Conservation Act (by which  
28 the National Highway Transportation Safety Administration sets and enforces corporate average

1 fuel economy standards); this claim alleges all variants of preemption: express preemption, field  
2 preemption, and implied preemption. (FAC ¶¶ 113, 114.) The second claim alleges preemption  
3 under the federal Clean Air Act, claiming both express preemption and implied preemption due  
4 to the U.S. Environmental Protection Agency’s current position that it does not have authority to  
5 regulate carbon dioxide for global climate change purposes. (FAC ¶ 122.) The third claim  
6 alleges preemption under the foreign policy powers of the federal government, claiming that  
7 California’s proposed regulatory amendments will interfere with the federal government’s ability  
8 to reach “multilateral agreements to reduce international greenhouse gas emissions.” (FAC ¶  
9 130.) The fourth claim alleges a violation of the dormant Commerce Clause, claiming that the  
10 proposed regulatory amendments’ burden on interstate commerce exceeds their benefits. (FAC ¶  
11 137.) The fifth claim alleges preemption under the federal antitrust laws, claiming that the  
12 proposed regulatory amendments require automobile manufacturers to join together to illegally  
13 coordinate and fix prices. (FAC ¶ 143.) While not at issue in this motion, defendant  
14 Witherspoon believes Plaintiffs’ legal and factual claims do not have merit.

### 15 ARGUMENT

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) involves an  
17 evaluation of the complaint, and assumes the truth of the factual allegations. *E.g., Cahill v.*  
18 *Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). While a jurisdictional challenge  
19 under Rule 12(b)(1) can present extrinsic evidence, defendant Witherspoon brings this motion  
20 based on the “face of the pleadings.” *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
21 1139 (9th Cir. 2003) (explaining that both kinds of motions can be brought). As such, the Court,  
22 as under Rule 12(b)(6), assumes the truth of the factual allegations of the complaint. *Id.*  
23 Nevertheless, since federal courts are courts of limited jurisdiction, the party asserting  
24 jurisdiction has the burden of establishing that jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*,  
25 511 U.S. 375, 377 (1994). In addition, the complaint’s legal conclusions are not assumed to be  
26 true, nor are factual allegations contradicted by documents referenced in the complaint. *Warren*,  
27 328 F.3d at 1139.

28 A challenge to venue under Rule 12(b)(3), however, involves the evaluation of

1 evidence (such as affidavits or declarations). *See, e.g., Airola v. King*, 505 F.Supp. 30, 31 (D.  
2 Az. 1980) (reference to affidavit). The plaintiff has the burden of showing venue is proper.  
3 *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979); *Koresko v.*  
4 *RealNetworks, Inc.*, 291 F.Supp.2d 1157, 1160 (E.D. Cal. 2003); *Nissan Motor Co. v. Nissan*  
5 *Computer Corp.*, 89 F.Supp.2d 1154, 1161 (C.D. Cal. 2000). *But see Carolina Casualty Co. v.*  
6 *Data Broadcasting Corp.*, 158 F.Supp.2d 1044, 1047 (N.D. Cal. 2001) (placing burden on  
7 defendant while (incorrectly) stating that the Ninth Circuit has not decided this question).

8 As discussed above, this motion raises three issues: (1) whether intra-district  
9 venue in Fresno is proper, given that the acts giving rise to this suit occurred outside this  
10 Division; (2) whether this case is ripe, given that the proposed regulatory amendments are not  
11 final; and (3) whether the doctrine of primary jurisdiction bars the second claim (alleging  
12 preemption under the Clean Air Act), given that Congress provided that the U.S. Environmental  
13 Protection Agency would determine whether California could adopt particular motor vehicle  
14 emission standards. This brief will discuss each of these in turn.

## 15 I.

### 16 **VENUE IS IMPROPER IN THE FRESNO DIVISION OF** 17 **THIS COURT, AND THIS CASE SHOULD BE** 18 **TRANSFERRED TO THE SACRAMENTO DIVISION.**

19 This District sets intra-district venue where the action arises. *See* E.D. Cal. L.R.  
20 3-120(d). Plaintiffs claim proper venue in Fresno because that is where they claim they will  
21 “suffer harm.” (FAC ¶ 33.) However, as this section of this brief will explain, the U.S. Supreme  
22 Court, in *Leroy v. Great Western United Corporation*, 443 U.S. 173, 186 (1979), and the Ninth  
23 Circuit, in *District No. 1 v. Alaska*, 682 F.2d 797, 799 (9th Cir. 1982), have expressly stated that,  
24 in federal question cases, the place where harm occurs is *not* a basis for proper venue when  
25 venue is based on where the claim arises. That leaves intra-district venue in this case proper  
26 only in Sacramento, where defendant Witherspoon has conducted her official duties to develop  
27 the challenged proposed regulatory amendments.<sup>4</sup>

28 4. Venue is proper within the Eastern District of California, since defendant  
Witherspoon does reside within this District, in Sacramento. *See* 28 U.S.C. § 1391(b)(1)

1 Statute authorizes this motion to change venue to a proper division: “The district  
2 court of a district in which is filed a case laying venue in the wrong division or district shall  
3 dismiss, or if it be in the interest of justice, transfer such case to any district or division in which  
4 it could have been brought.” 28 U.S.C. § 1406(a). *See also* E.D. Cal. L.R. 3-120(f). The  
5 propriety of venue is a question of law. *Decker Coal Co. v. Commonwealth Edison Co.*, 805  
6 F.2d 834, 841 (9th Cir. 1986). The Ninth Circuit has expressed the opinion that when venue is  
7 “doubtful,” the better course of action is to transfer the case to a venue where venue is not in  
8 doubt. *See Phillips v. Baker*, 121 F.2d 752, 756 (9th Cir. 1941).

9 This motion, based on improper venue, is different from a motion brought “[f]or  
10 the convenience of parties and witnesses, in the interest of justice.” *See* 28 U.S.C. § 1404(a). In  
11 a “convenience” motion, the question is whether there is a more convenient forum between two  
12 (or more) proper venues. *See id.* (“a district court may transfer any civil action to any other  
13 district or division where it might have been brought”). In this motion, under 28 U.S.C. section  
14 1406(a), the question is whether Plaintiffs’ chosen venue is proper or wrong; if venue is wrong,  
15 either dismissal or transfer is mandatory. *See id.* § 1406(a) (the court “shall” dismiss or  
16 transfer)).

17 **A. Intra-district Venue Is Proper Only If the**  
18 **Claims “Arose” in this Division.**

19 Local Rule 3-120(d) sets intra-district venue for cases filed in this District:

20 All civil and criminal actions and proceedings of every nature and kind . . . arising  
21 in Calaveras, Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Stanislaus,  
22 Tulare and Tuolumne counties shall be commenced in the United States District  
23 Court sitting in Fresno, California . . . . All civil and criminal actions and legal  
24 proceedings of every nature and kind . . . arising in Alpine, Amador, Butte,  
Colusa, El Dorado, Glenn, Lassen, Modoc, Mono, Nevada, Placer, Plumas,  
Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Solano, Sutter, Tehama,  
Trinity, Yolo and Yuba counties shall be commenced in Sacramento, California . .  
..

25 The operative language of this rule – actions “arising in” certain counties – originates from this  
26 District’s General Order No. 18 (*see* RJN, Exh. A), adopted at the same time that Congress

27 \_\_\_\_\_  
28 (describing venue as appropriate where “any defendant resides, if all defendants reside in the  
same State”). (*See* FAC ¶ 32.)

1 created the Eastern District (*see* Act of March 18, 1966, Pub. L. No. 89-372, § 3, 1966  
2 U.S.C.C.A.N. (80 Stat. 75) 86, 87-88). Thus, for purposes of this case, intra-district venue is  
3 proper only where the action “arises.”

4           This same terminology was the operative language in the general venue statute for  
5 many years. From 1966 to 1990,<sup>5</sup> venue in federal question cases could *only* “be brought in the  
6 judicial district where all defendants reside, or in which the claim *arose*, except as otherwise  
7 provided by law.” *See* Act of November 2, 1966, Pub. L. No. 89-714, 1966 U.S.C.C.A.N. (80  
8 Stat. 1111) 1300 (enacting former 28 U.S.C. § 1391(b)) (emphasis added). Not surprisingly,  
9 there were a large number of federal court cases interpreting this “claim arose” language. *See*  
10 *generally* 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and*  
11 *Procedure* § 3806, at 41-72 & supp. 52-74 (2d ed. 1986 & Supp. 2004) (discussing cases). This  
12 body of precedent should guide this Court’s interpretation of its intra-district venue local rule,  
13 for it utilizes the same language, deals with the same topic (venue), and was initially adopted at  
14 the same time. *See, e.g., United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004) (“similar  
15 language in similar statutes should be interpreted similarly”).

16           A number of different tests developed to interpret the “claim arose” language.  
17 *See, e.g., Rosenfeld v. S.F.C. Corp.*, 702 F.2d 282, 284 (1st Cir. 1983) (describing three of the  
18 tests). In fact, this fragmentation of the precedent appears to have led, in part, to the statutory  
19 revisions that occurred in 1990. *See* H.R. Rep. No. 101-734, at 23 (1990), *reprinted in* 1990  
20 U.S.C.C.A.N. 6860, 6869 (calling this statutory phrase “litigation breeding”). However, the  
21 Ninth Circuit adopted a single test, which asked whether the venue was one “in which a  
22 substantial part of the acts, events, or omissions occurred that gave rise to the claim for relief.”  
23 *E.g., Sustain v. Shapiro & Lieberman*, 678 F.2d 115, 117 (9th Cir. 1982); *Commercial Lighting*  
24 *Prods., Inc. v. United States Dist. Court*, 537 F.2d 1078, 1080 (9th Cir. 1976). Importantly, and

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26           5. Prior to 1966, venue in federal question cases was only where “all defendants  
27 reside.” *See* Act of June 25, 1948, ch. 646, 1948 U.S.C.C.A.N. 695, A90. After 1990, venue in  
28 federal question cases included the “district in which a substantial part of the events or omissions  
giving rise to the claim occurred.” *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650,  
§ 311, 1990 U.S.C.C.A.N. (104 Stat.) 5089, 5114.

1 as the next subsection of this brief will explain, this test does not include where the injury or  
2 harm occurred. *Leroy*, 443 U.S. at 186; *District No. 1*, 682 F.2d at 799.

3 **B. Harm Is Not a Basis for Deciding Where a Claim**  
4 **“Arose,” and So Intra-district Venue Is Proper**  
5 **Only Where Defendant Witherspoon’s Acts**  
6 **Have Occurred.**

7 *Leroy* is the seminal U.S. Supreme Court case on venue under the “claim arose”  
8 language of former 28 U.S.C. section 1391(b). In that case, the plaintiff was a corporation with  
9 headquarters in Texas that brought an action against Idaho state officers, challenging an Idaho  
10 state statute that imposed restrictions on corporate takeovers of companies having substantial  
11 assets in Idaho. 443 U.S. at 175-77. The Supreme Court bypassed the normally preliminary  
12 question of personal jurisdiction because “it [was] so clear that venue was improper” in Texas.  
13 *Id.* at 181.

14 After quickly dispatching the plaintiff’s venue argument under section 27 of the  
15 Securities Exchange Act of 1934, the Court turned to the question of the proper interpretation of  
16 the phrase “in which the claim arose.” *Id.* at 181-87. First, the Court set the context for this  
17 question: “the purpose of statutorily specified venue is to protect the *defendant* against the risk  
18 that a plaintiff will seek an unfair or inconvenient place of trial. For that reason, Congress has  
19 generally not made the residence of the plaintiff a basis for venue in nondiversity cases.” *Id.* at  
20 183-84 (emphasis in original). The Court explained that venue statutes are not to be read  
21 broadly to benefit plaintiffs. *Id.* at 184 & n.18. And it emphasized this point further: “it is  
22 absolutely clear that Congress did not intend to provide for venue at the residence of the plaintiff  
23 or to give that party an unfettered choice among a host of different districts.” *Id.* at 185.

24 The facts in *Leroy* showed that Idaho was the proper venue. *Id.* at 185-86. The  
25 legislative and enforcement actions were taken in Idaho by Idaho residents. *Id.* The bulk of the  
26 evidence – other than the plaintiff’s employees and the experts – were in Idaho. *Id.* at 186. And  
27 the Court noted that a constitutional challenge to an Idaho state statute would be appropriate in  
28 Idaho. *Id.*

The Court of Appeals had reasoned that the claim arose in Texas because “that is

1 where Idaho’s statute had its impact on Great Western.” *Id.* The Supreme Court clearly rejected  
2 that interpretation:

3 [W]e note that [the Court of Appeal’s] reasoning would subject the Idaho officials  
4 to suit in almost every district in the country. For every prospective offeree—be he  
5 in New York, Los Angeles, Miami, or elsewhere, rather than in Dallas—could  
6 argue with equal force (or Great Western could argue on his behalf) that he had  
7 intended to direct his local broker to accept the tender and was frustrated in that  
8 desire by the Idaho law. As we noted above, however, such a reading of § 1391(b)  
9 is inconsistent with the underlying purpose of the provision, for it would leave the  
10 venue decision entirely in the hands of plaintiffs, rather than making it “primarily  
11 a matter of convenience of litigants and witnesses.”

12 *Id.* at 186-87 (citation and footnote omitted). Thus, the Supreme Court announced the rule that  
13 venue – at least under the “claim arose” language – cannot be based on where the impact or harm  
14 due to a challenged state law occurs.

15 The Ninth Circuit followed this reasoning in its *District No. 1* case. There,  
16 employees of a ferry system run by the State of Alaska (that operated between Alaska and  
17 Seattle, Washington) challenged an Alaska statute that prevented employees from being  
18 “relieved” outside Alaska. 682 F.2d at 797. The Ninth Circuit discussed *Leroy*, and found the  
19 appropriate venue in its case to be in Alaska. *Id.* at 798-99. The Ninth Circuit acknowledged  
20 that a variety of other courts had “held, in cases involving challenges to the constitutionality or  
21 application of state statutes, that venue was proper where the effects of the statutes were felt as  
22 well as where they were enacted and administered.” *Id.* at 799. However, the Ninth Circuit  
23 rejected this argument – and expressly declined to follow such cases because they were  
24 “inconsistent with *Leroy*.” *Id.*

25 Thus, under binding precedent, a claim challenging the propriety of a state law  
26 simply does not “arise” where its effects are felt. The location of a state law’s effects is simply  
27 not relevant to venue. To say otherwise would allow plaintiffs to challenge state laws wherever  
28 they please. This would make restrictions on venue meaningless. And it would be bad policy.  
29 After all, as the U.S. Supreme Court reminds us, the purpose of venue provisions is to protect the  
30 *defendant* from improper venue choices. *See Leroy*, 477 U.S. at 183-85.

31 In this case, these same principles are at play. Plaintiff Alliance of Automobile  
32 Manufacturers brings this case on behalf of its members – including plaintiffs General Motors

1 Corporation and DaimlerChrysler Corporation – who are headquartered throughout the country  
2 and who build automobiles throughout the country as well. (See Cross Decl. ¶¶ 5, 6.) If venue  
3 were appropriate where the effects of the challenged proposed regulatory amendments were felt,  
4 venue would also be appropriate throughout the country. Such a construction is both implausible  
5 and unfair.

6           Instead, the question is where a “a substantial part of the acts, events, or  
7 omissions occurred that gave rise to the claim for relief.” *Sutain*, 678 F.2d at 117. Here,  
8 Plaintiffs bring a facial challenge to the Air Resources Board’s proposed regulatory  
9 amendments. Plaintiffs have sued the Air Resources Board’s Executive Officer, the person who  
10 would issue the final regulatory amendments and who would be responsible for enforcing the  
11 then-final regulatory amendments. Thus, the acts that give rise to Plaintiffs’ claims are  
12 defendant Witherspoon’s acts to adopt these proposed regulatory amendments. Defendant  
13 Witherspoon’s office and, thus, official residence are in Sacramento. (FAC ¶ 32; Cross Decl. ¶  
14 3.) Within this District, Sacramento is the place where defendant Witherspoon and her staff have  
15 taken steps towards adopting these proposed regulatory amendments. (Cross Decl. ¶¶ 2-4.)  
16 Thus, the acts within this District that Plaintiffs challenge have occurred (and will occur) in  
17 Sacramento.<sup>6</sup> These are the acts that gave rise to Plaintiffs’ claims. And so venue within this  
18 District is proper only in the Sacramento Division.

19           **C. Even If Harm Were Part of the Calculus for**  
20           **Intra-district Venue, No Harm Has Occurred in**  
21           **the Fresno Division.**

22           Moreover, even if the Court could properly look to a plaintiff’s injury as a basis  
23 for venue, intra-district venue in this case would not be proper in Fresno. That is because the  
24 test for venue looks to acts that occurred in the past, not the future, and Plaintiffs’ alleged  
25 injuries have not occurred in the Fresno area. As discussed above, the Ninth Circuit test for  
26 deciding where a claim “arises” is where a “a substantial part of the acts, events, or omissions

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27           6. As alleged in Plaintiffs’ amended complaint, the Air Resources Board also  
28 adopted a resolution initiating the process for adoption of these proposed regulatory  
amendments, and did so in Los Angeles. (FAC ¶ 8 & Exh. A.) However, that act occurred in the  
Central District of California, and does not affect intra-district venue in this District.

1 occurred that gave rise to the claim for relief.” *Sutain*, 678 F.2d at 117 (emphasis added). The  
2 Court looks to the past, to what has already happened. This approach is sensible, since looking  
3 to the future would require all sorts of speculation about how individuals and companies will act  
4 in the future. *See cf. Decker Coal*, 805 F.2d at 842 (deciding whether a contract claim arises at  
5 the place of performance, rather than the place of repudiation, because it is known to the parties  
6 and a contrary rule would “invite forum shopping”). By looking to the past, the Court can  
7 objectively evaluate the facts that are relevant to venue.

8           Here, Plaintiffs cannot reasonably claim any injury has already occurred due to  
9 not-yet-adopted regulatory amendments.<sup>7</sup> (*See* FAC ¶ 106 (“Plaintiffs have no adequate legal  
10 remedy for the injuries they *would* suffer if the CARB regulation goes into effect.” (emphasis  
11 added)).) The proposed regulatory amendments are not yet final, and will not be effective until  
12 at least 2006. Certainly, since these proposed regulatory amendments would not apply until  
13 model year 2009, there has been no injury at all to any local car dealers or any individual  
14 purchasers of motor vehicles. Even Plaintiffs seem to admit – by omission – that any near-term  
15 effects would be on manufacturers where they design and build motor vehicles (outside this  
16 District), not on local car dealers or individual purchasers in the Fresno area. (*See* FAC ¶¶ 97-  
17 107.) The only acts or events that have already occurred and thus could arguably give rise to  
18 Plaintiffs’ claims are a public hearing in Los Angeles (where the Air Resources Board adopted  
19 Resolution 04-28) and the Air Resources Board’s staff’s actions in Sacramento and El Monte (in  
20 Southern California) (to further develop the proposed regulatory amendments at issue). (FAC ¶  
21 8 & Exh. A; Cross Decl. ¶¶ 2-4.) Thus, Plaintiffs’ claims do not arise within the Fresno  
22 Division.

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27           7.       And even if they had alleged past injury, Plaintiffs could not bring claims based  
28 on that past injury. Claims other than for prospective injunctive relief would be barred by the  
Eleventh Amendment. *See, e.g., Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269-70 (1997).

1                   **D.     Even If Harm and Future Acts Were Part of the**  
2                   **Calculus for Intra-district Venue, Substantial**  
3                   **Acts Still Will Not Occur Within the Fresno**  
4                   **Division.**

5                   Even if the Court were to consider Plaintiffs’ alleged injury and consider future  
6 acts that allegedly provide a basis for that alleged injury, the Ninth Circuit requires that “a  
7 substantial part” of the acts, events, or omissions occur where venue is sought. *Sustain*, 678 F.2d  
8 at 117.

9                   This just is not so for Fresno, given the other connections to other places. The Air  
10 Resources Board’s public hearing occurred in Los Angeles. (FAC ¶ 8.) The Air Resources  
11 Board staff’s actions to further develop the proposed regulatory amendments have occurred in  
12 Sacramento and El Monte. (Cross Decl. ¶ 4.) Defendant Witherspoon’s actions in the future to  
13 further develop the proposed regulatory amendments and to enforce the then-final regulatory  
14 amendments would occur in Sacramento. (Cross Decl. ¶ 3.) The automobile manufacturers’  
15 headquarters – where management decisions will occur and profits will allegedly be affected –  
16 are outside the Eastern District. (Cross Decl. ¶ 5.) In fact, in their amended complaint, Plaintiffs  
17 go to great lengths to describe the alleged difficulty of these management decisions. (*See* FAC  
18 ¶¶ 101-04.) Moreover, only one of the automobile manufacturers’ plants – where the cars that  
19 would be affected by these proposed regulatory amendments will actually be produced – is in  
20 California, and that plant is not within the Eastern District. (Cross Decl. ¶ 6.) It is only a small  
21 proportion of the affected vehicles that will be sold within the Fresno Division; many more  
22 vehicles, obviously, will be sold in other, more populous parts of California.<sup>8</sup> (Cross Decl. ¶ 7.)

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23                   8.       The Court should not give very much weight, if any, to the presence of the local  
24 car dealers plaintiffs and plaintiff Tulare County Farm Bureau, because they are at most nominal  
25 plaintiffs. *See cf. Immigrant Assistance Project v. Immigration & Naturalization Serv.*, 306 F.3d  
26 842, 867 n.20 & 868 (9th Cir. 2002) (considering venue determined only by plaintiffs with  
27 proper standing); *National Distillers & Chem. Corp. v. Department of Energy*, 487 F.Supp. 34,  
28 36-37 (D. Del. 1980) (reasoning that improper or collusive joinder cannot create venue). *But see*  
*Sidco Indus. Inc. v. Wimar Tahoe Corp.*, 768 F.Supp. 1343, 1346 (D. Or. 1991) (holding –  
contrary to *Immigrant Assistance Project*, 306 F.3d at 867 n.20 & 868 – that venue is not  
affected by a change in parties after filing). It is not these Plaintiffs, but rather the manufacturer  
plaintiffs who will be most affected by these proposed regulatory amendments, who face any  
alleged hardship in the immediate future, and who have hired national counsel. The Court can

1 Thus, when looking at the whole of this action, Fresno is not where a substantial part of the acts  
2 and events that give rise to the claims have occurred (or will occur). These acts have occurred  
3 (and will occur) where the proposed regulatory amendments have been developed, where the  
4 proposed regulatory amendments would continue to be developed, where the then-final  
5 regulatory amendments would be administered and enforced, and where the vehicles would be  
6 manufactured. Within this District, these acts are within the Sacramento Division, not within the  
7 Fresno Division.

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9 Thus, intra-district venue for this case is not proper in this Division. To remedy  
10 this, the Court may dismiss or transfer the case to the proper division, depending on “the  
11 interests of justice.” *See* 28 U.S.C. § 1406(a). On this venue question, defendant Witherspoon  
12 believes a transfer to the Sacramento Division, rather than dismissal, is appropriate.<sup>9</sup>

## 13 II.

### 14 **THIS CASE IS NOT RIPE BECAUSE CALIFORNIA HAS** 15 **NOT TAKEN FINAL ACTION TO ADOPT THESE** 16 **REGULATORY AMENDMENTS, AND FOR OTHER** 17 **REASONS.**

18 A case must be “ripe” – that is, not brought too early – for the courts to exercise  
19 jurisdiction. *Lee v. Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997). In a case challenging state  
20 regulations, finality is a fundamental requirement for that case to be ripe. *Association of Am.*  
21 *Med. Colls. v. United States*, 217 F.3d 770, 780 (9th Cir. 2000). As explained below, this case  
22 does not meet this requirement because it challenges proposed regulatory amendments that are  
23 not yet final. In addition, Plaintiffs’ case relies on a pending decision in the U.S. Court of  
24 Appeals for the District of Columbia Circuit, Plaintiffs’ case raises substantial factual issues, and  
25 any potential hardship is speculative and limited. Because of these issues, either a dismissal or a

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26 see that plaintiffs Alliance of Automobile Manufacturers, General Motors Corporation, and  
27 DaimlerChrysler Corporation are the real plaintiffs in this case. Their attempt to add local car  
28 dealers and the Tulare County Farm Bureau is only an artifice to attempt to create venue in this  
Division.

9. If the Court does transfer this case, the Court could defer ruling on the other  
aspects of this motion.

1 stay for several months is appropriate.<sup>10</sup>

2           The ripeness doctrine is based on constitutional limits on judicial power – what  
3 constitutes a “case or controversy” under Article III of the Constitution – and on prudential  
4 reasons why courts should not exercise their jurisdiction. *See National Park Hospitality Ass’n v.*  
5 *Department of Interior*, 538 U.S. 803, 808 (2003). *See also Thomas v. Anchorage Equal Rights*  
6 *Comm’n*, 220 F.3d 1134, 1138-42 (9th Cir. 2000) (distinguishing between constitutional and  
7 prudential aspects of ripeness). Ripeness is

8           a justiciability doctrine designed “to prevent the courts, through avoidance of  
9 premature adjudication, from entangling themselves in abstract disagreements  
10 over administrative policies, and also *to protect the agencies from judicial*  
*interference until an administrative decision has been formalized* and its effects  
felt in a concrete way by the challenging parties.”

11 *National Park Hospitality Ass’n*, 538 U.S. at 807-08 (quoting *Abbott Laboratories v. Gardner*,  
12 387 U.S. 136, 148-149 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99  
13 (1977)) (emphasis added).

14           “Principles of federalism lend this doctrine additional force when a federal court  
15 is reviewing a state agency decision at an interim stage in an evolving process. See 13A Wright,  
16 Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3532.1 n. 16 & accompanying  
17 text (2d ed. 1984 & Supp.1998).” *US West Communications v. MFS Intelenet, Inc.*, 193 F.3d  
18 1112, 1118 (9th Cir. 1999). *See also New Orleans Public Serv., Inc. v. City of New Orleans*,  
19 491 U.S. 350, 371-73 (1989) (explaining Supreme Court’s concern in “preserv[ing] the integrity  
20 of a unitary and still-to-be-completed legislative process” in assessing ripeness of claim  
21 challenging a local rule, and discussing *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908)).

22           The ripeness inquiry asks whether a case has been brought prematurely. *Lee v.*  
23 *Oregon*, 107 F.3d at 1387. The basic two-part test for ripeness was first set forth in *Abbott*

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25           10. Because of the extended briefing schedule agreed upon for this motion, it is  
26 conceivable that, by the time the Court decides this motion, the challenged proposed regulatory  
27 amendments will be final or the District of Columbia Circuit will have decided the case before it.  
28 The Court should decide the motion based upon the facts present at the time of its decision,  
rather than the filing of the complaint. *See Regional Rail Reorganization Act Cases*, 419 U.S.  
102, 140 (1974). Counsel will endeavor to keep the Court informed of the current status of these  
events.

1 *Laboratories*: courts look to “the fitness of the issues for judicial decision” and “the hardship to  
2 the parties of withholding court consideration.” 387 U.S. at 149. “A claim is not ripe for  
3 adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed  
4 may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation  
5 marks and citations omitted). This is a question of law. *Anchorage v. United States*, 980 F.2d  
6 1320, 1322-23 (9th Cir. 1992). And can be raised by the Court on its own. *Southern Pac.*  
7 *Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990).

8 **A. There Is No Final Administrative Decision to**  
9 **Challenge, and Thus Plaintiffs’ Claims Are Not**  
10 **Fit for Review.**

11 The Ninth Circuit has recently summarized its precedent on how to evaluate the  
12 first question, the fitness of the issues for judicial decision:

13 [A]gency action is fit for review if the issues presented are purely legal and the  
14 regulation at issue is a final agency action. Courts traditionally take a pragmatic  
15 and flexible view of finality. The core question is whether the agency has  
16 completed its decisionmaking process, and whether the result of that process is  
17 one that will directly affect the parties.

18 *Association of Am. Med. Colls.*, 217 F.3d at 780 (citations and internal quotation marks omitted).  
19 “Informal or tentative regulations are not final.” *Id.*

20 The requirement of finality is well recognized in this Circuit. *See, e.g., id.* (citing  
21 to *Anchorage*, 980 F.2d at 1323, *Ukiah Valley Medical Ctr. v. Federal Trade Comm’n*, 911 F.2d  
22 261, 264 (9th Cir. 1990), *Mt. Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir.  
23 1989), and *Sierra Club v. United States Nuclear Regulatory Comm’n*, 825 F.2d 1356, 1362 (9th  
24 Cir. 1987)); *US West*, 193 F.3d at 1118 (for a claim to be fit for decision, one requirement is that  
25 “the challenged action is final”). The purpose of requiring finality is to avoid the situation  
26 “where pending administrative proceedings or further agency action *might* render the case moot  
27 and judicial review completely unnecessary.” *Sierra Club*, 825 F.2d at 1362 (emphasis added).

28 For a challenge to state regulations to be ripe, there often must be more than  
29 finality. In some instances, final regulations may not be fit for review until the regulation is  
30 actually “concretely applied” to the plaintiff. *Association of Am. Med. Colls.*, 217 F.3d at 780  
31 (citing *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 891 (1990)). This issue – when ripeness

1 concerns prevent a facial challenge to a final regulation that is either not yet effective or has not  
2 yet been enforced – is a difficult and oft-litigated issue, prompting several Ninth Circuit  
3 decisions. *See, e.g., Auburn v. Qwest Corp.*, 260 F.3d 1160, 1170-73 (9th Cir. 2001);  
4 *Association of Am. Med. Colls.*, 217 F.3d at 780-82; *Anchorage*, 980 F.2d at 1323-25;  
5 *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 787-90 (9th Cir.  
6 1986).

7 But, here, the Court need not reach that more difficult question, because there is  
8 not even a final administrative decision. The Air Resources Board adopted a resolution in which  
9 it decided “that, subject to further environmental analysis, the Board is *initiating* steps towards  
10 final adoption” of the challenged proposed regulatory amendments. (FAC, Exh. A, at 14  
11 (emphasis added).) But the Air Resources Board did not formally adopt any proposed regulatory  
12 amendments by way of that resolution. Instead, it delegated the remaining tasks to its Executive  
13 Officer, defendant Witherspoon. (FAC, Exh. A, at 14-15.) These tasks include:

- 14 ● compiling the proposed regulatory amendments “in accordance with the Board’s  
15 direction, with such additional conforming modifications as may be appropriate;”
- 16 ● making this regulatory text available for public comment;
- 17 ● considering that public comment;
- 18 ● incorporating “any additional modifications she determines appropriate” (and  
19 putting those out for public comment, if necessary);
- 20 ● “preparing a written response to all comments received that have raised  
21 significant environmental issues;”
- 22 ● “assuring that all feasible mitigation measures or feasible alternatives available  
23 that would substantially reduce any significant adverse environmental impacts  
24 have been incorporated into the final action;” and
- 25 ● taking “appropriate final action with the adoption and amendments in this  
26 rulemaking.”

27 (FAC, Exh. A, at 14-15.)

28 In addition, California’s Office of Administrative Law must approve the proposed

1 regulatory amendments before they become final and have the force of law. *See* Cal. Govt. Code  
2 §§ 11343, 11343.4, 11349.1(a), 11349.3. The Office of Administrative Law reviews regulations  
3 submitted to it for necessity, authority, clarity, consistency, reference, and nonduplication. *Id.* §  
4 11349.1(a). *See also id.* § 11349 (definitions of these terms). The Office of Administrative Law  
5 also ensures that the proper documentation is included in the rulemaking file. *Id.* § 11349.1(d),  
6 (f). The Office of Administrative Law must approve or disapprove of a regulation within 30  
7 working days after submission to it. *Id.* § 11349.3(a).

8           Defendant Witherspoon has taken some of the actions delegated to her. But there  
9 is no final executive order adopting these proposed regulatory amendments.<sup>11</sup> Nor has anything  
10 been submitted to the Office of Administrative Law. These proposed regulatory amendments,  
11 thus, do not have the force of law. If the process stopped right now, for any reason, the  
12 challenged proposed regulatory amendments would not impose any obligations on anyone.  
13 Because of this, there is no final action to challenge,<sup>12</sup> and under controlling Ninth Circuit  
14 precedent the issues raised by Plaintiffs’ amended complaint are not fit for judicial review.<sup>13</sup>

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19           11. Since ripeness is a jurisdictional issue, Plaintiffs have the burden of establishing  
20 their case is ripe. *Kokkonen*, 511 U.S. at 377. And Plaintiffs cannot contradict documents  
21 referenced in the complaint (such as Air Resources Board Resolution 04-28). *See Warren*, 328  
22 F.3d at 1139. Thus, the interim nature of the proposed regulatory amendments as set forth in  
23 Resolution 04-28 is properly before the Court, and it is Plaintiffs’ burden to show that  
24 subsequent, necessary actions have occurred.

25           12. In their amended complaint, Plaintiffs added an allegation that “no further action  
26 by CARB is required in order to implement the provisions of A.B. 1493.” (*Compare* FAC ¶ 7  
27 *with* Complaint ¶ 2.) Plaintiffs’ allegation is misleading. Under the Air Resources Board’s  
28 Resolution 04-28 and California’s Administrative Procedure Act, it is defendant Witherspoon  
(acting under Air Resources Board authority delegated to her) and California’s Office of  
Administrative Law – not the Air Resources Board itself – that need to act for the challenged  
proposed regulatory amendments to be final, and have the force of law.

          13. In their amended complaint, Plaintiffs also added boilerplate allegations  
attempting to mimic the first part of the *Abbott Laboratories* test for ripeness. (*Compare* FAC ¶¶  
117, 124, 131, 137, and 143 *with* Complaint ¶¶ 93, 100, 107, 113, and 119.) However, Plaintiffs  
must allege facts that would support these conclusions, and an allegation of a legal conclusion is  
not sufficient. *See Warren*, 328 F.3d at 1139.

1                   **B. Analysis of the Legal Issues in this Case Should**  
2                   **Await a Decision in *Commonwealth of***  
3                   ***Massachusetts v. United States Environmental***  
4                   ***Protection Agency.***

5                   There is at least one additional reason that the issues raised by Plaintiffs are not  
6 now fit for decision. Plaintiffs’ theory in this case largely depends on a particular outcome in a  
7 case currently being considered by the U.S. Court of Appeals for the District of Columbia  
8 Circuit: *Commonwealth of Massachusetts v. United States Environmental Protection Agency*,  
9 Nos. 03-1361 through 03-1368. Plaintiffs understand the relevance of this case to their claims,  
10 since they cite to it in their complaint and amended complaint. (Complaint ¶ 43; FAC ¶ 48.)  
11 The *Commonwealth of Massachusetts* case is fully briefed, scheduled for oral argument on April  
12 8, 2005, and will be decided by August of this year.

13                   The *Commonwealth of Massachusetts* case challenges a controversial  
14 administrative decision by the U.S. Environmental Protection Agency (“US EPA”) that it does  
15 not have authority to regulate motor vehicle emissions for climate change purposes under  
16 Section 202 the Clean Air Act. (*See, e.g.*, RJN, Exhs. E, F, G, H.) That administrative decision  
17 rests on a narrow reading of the term “air pollutant.” *See* Control of Emissions from New  
18 Highway Vehicles and Engines, 68 Fed. Reg. 52922, 52925-29 (2003). *But see* 42 U.S.C. §  
19 7602(g) (defining term “air pollutant” broadly).

20                   The outcome of this challenge in the District of Columbia Circuit will likely have  
21 a significant impact on Plaintiffs’ case. Plaintiffs rest their second claim squarely on the premise  
22 that US EPA’s decision is correct and valid: Plaintiffs posit that if US EPA cannot regulate for  
23 climate change purposes under Section 202 of the Clean Air Act, then California cannot show  
24 consistency with Section 202(a) in applying for a waiver of preemption under Section 209(b) of  
25 the Clean Air Act. (Complaint ¶¶ 46, 47, 99; FAC ¶¶ 50, 51, 123.) While this issue is not quite  
26 so simple,<sup>14</sup> if US EPA’s decision is reversed on this point, then Plaintiffs will presumably

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27                   14. For example, even if US EPA’s position that it has no authority to regulate for  
28 climate change purposes is upheld, this narrow administrative interpretation of the term “air  
pollutant” (by its own terms) applies to all parts of the Clean Air Act. *See* 68 Fed. Reg. at  
52928. If so, then Section 209 of the Clean Air Act (the state law preemption provision) would

1 voluntarily dismiss their second claim.<sup>15</sup> In addition, the central question before the District of  
2 Columbia Circuit – whether the Clean Air Act provides US EPA with authority to regulate for  
3 climate change purposes – may affect this Court’s analysis of other claims in this case:

- 4 ● On the first claim (preemption under the Energy Policy and Conservation Act),  
5 one of defendant Witherspoon’s arguments will be that emission standards  
6 adopted by US EPA and California (under Sections 202 and 209(b), respectively,  
7 of the Clean Air Act) that significantly affect fuel economy were contemplated  
8 and endorsed by Congress, and thus are consistent with congressional intent. *See,*  
9 *e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974) (“when two statutes are  
10 capable of co-existence, it is the duty of the courts, absent a clearly expressed  
11 congressional intention to the contrary, to regard each as effective”). *See also*  
12 H.R. Rep. No. 94-340, at 86-94 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1762,  
13 1848-56 (1975 Energy Policy and Conservation Act legislative history, discussing  
14 fuel economy effects of federal and California emission standards); H.R. Rep. No.  
15 95-294, at 244-51 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1323-30 (1977  
16 Clean Air Act legislative history, approving of emission standards that also  
17 increased fuel economy).
- 18 ● On the third claim (preemption under the federal government’s foreign policy  
19 power), one of defendant Witherspoon’s arguments will be that, in enacting  
20 Section 209(b) of the Clean Air Act, Congress specifically authorized this kind of  
21 action by California. *See, e.g., Barclays Bank PLC v. Franchise Tax Bd.*, 512

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23 also not apply to state laws adopted for climate change purposes, since Section 209 uses the term  
24 “emission standard,” which is defined by use of the term “air pollutant.” *See* 42 U.S.C. §§  
25 7543(b), 7602(k).

26 In addition, in interpreting the consistency requirement of Section 209(b), in  
27 evaluating a California motor vehicle emission standard, US EPA has not, in the past, inquired  
28 whether it has the authority to regulate a particular air pollutant, but instead has only asked  
whether there is sufficient lead time for the necessary technology and whether federal and state  
test procedures impose inconsistent certification requirements. *MEMA III*, 142 F.3d at 463.

15. As discussed below, however, the Court should consider dismissing this claim  
now, under the primary jurisdiction doctrine. *See infra* Section III.

1 U.S. 298, 327-38 (1994) (looking to laws passed by Congress on the question of  
2 whether the foreign policy of the United States is “threatened” by a state law).

- 3 ● On the fourth claim (under the dormant Commerce Clause), one of defendant  
4 Witherspoon’s arguments will be, again, that Section 209(b) of the Clean Air Act  
5 specifically authorizes this kind of action by California. *See, e.g., Oxygenated*  
6 *Fuels Ass’n, Inc. v. Davis*, 163 F.Supp.2d 1182, 1188 (E.D. Cal. 2001), *aff’d* 331  
7 F.3d 665 (9th Cir. 2003) (holding that Congress authorized California to adopt  
8 fuel standards under the Clean Air Act, and thus there could be no dormant  
9 Commerce Clause claim).

10 If the District of Columbia Circuit disagrees with US EPA’s position that US EPA does not have  
11 authority to regulate carbon dioxide for climate change purposes, that decision will bolster these  
12 arguments asserted in defense of this lawsuit.

13 The parties to this case are also parties to the *Commonwealth of Massachusetts*  
14 case. The State of California – on behalf of Governor Arnold Schwarzenegger, the Air  
15 Resources Board, and Attorney General Bill Lockyer – filed two of the eight original petitions.  
16 (RJN, Exh. E, at i.) Plaintiff Alliance of Automobile Manufacturers intervened to support the  
17 federal government’s position. (RJN, Exh. G (corporate disclosure statement, at 1).) So, too, did  
18 the National Automobile Dealers Association, a group that purports to represent car dealers  
19 across the country. (RJN, Exh. G (corporate disclosure statement, at 1).)

20 The District of Columbia Circuit is scheduled to hear oral argument on April 8,  
21 2005. (FAC ¶ 48.) According to information available on the District of Columbia Circuit’s  
22 website, the average time from oral argument to decision is 68 days. (RJN, Exh. B.) It appears  
23 that in cases against US EPA, the time to decision is a little longer, averaging 94 days.<sup>16</sup> These  
24 particular intervals to decision would lead to a decision in the *Commonwealth of Massachusetts*

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25  
26 16. Counsel derived this number by doing a search on the electronic database  
27 Westlaw for cases in the District of Columbia Circuit against the US EPA or its Administrator.  
28 This search disclosed 46 substantive decisions in such cases between September 2001 and March  
7, 2005, the date of the filing of this brief. The 94 day figure is simply the average number of  
days between oral argument (or the completion of briefing, if there was no oral argument) and  
the date of the decision.

1 case on June 15, 2005 or July 11, 2005, respectively. In addition, there is an outside boundary  
2 when that case will be decided: the District of Columbia Circuit’s policy is to decide every case  
3 within the September-to-August term in which it is heard. (RJN, Exh. B.) In cases against US  
4 EPA since the 2001-2002 term, this commitment has *always* been met.<sup>17</sup> Thus, the Court can  
5 reasonably expect a decision in the *Commonwealth of Massachusetts* case between June and  
6 August of this year.

7           Because the *Commonwealth of Massachusetts* case is an important aspect in  
8 determining the legal issues in this case – at least under Plaintiffs’ theory of the case – it makes  
9 sense to wait until that case is decided. Otherwise, this Court may need to decide some of the  
10 issues before the District of Columbia Circuit. With a final administrative decision by defendant  
11 Witherspoon and a decision from the District of Columbia Circuit, the parties can then move  
12 forward with the proper context for this case.

13           **C. Some Claims in Plaintiffs’ Amended Complaint**  
14           **Raise Factual Issues That Depend on Future**  
15           **Events, Making Those Claims Even Less Fit for**  
16           **Review.**

17           As mentioned above, the Ninth Circuit has explained that a case (or claim) can be  
18 fit for review (and therefore ripe), under the *Abbott Laboratories* test, if there is a final agency  
19 action and “the issues presented are purely legal.” *Association of Am. Med. Colls.*, 217 F.3d at  
20 780 (quoting *Anchorage*, 980 F.2d at 1323.) It appears that the issues, to be ripe, could be  
21 “predominantly legal.” See *Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Devel.*  
22 *Comm’n*, 461 U.S. 190, 201 (1983). The courts ask whether “further factual development would  
23 ‘significantly advance our ability to deal with the legal issues presented’ and would ‘aid us in  
24 their resolution.’” *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 737 (1998) (quoting *Duke*  
*Power Co. v. Carolina Env’tl. Study Group, Inc.*, 438 U.S. 59, 82 (1978)).

25           To be sure, Plaintiffs’ amended complaint raises some significant legal issues.  
26 And defendant Witherspoon believes she has legal defenses (including those sketched in Section  
27 \_\_\_\_\_

28           17. This conclusion is based on a review of the 46 such cases argued since the 2001-  
2002 term, as discussed in the previous footnote.

1 II.B.) for the claims alleged. However, Plaintiffs’ amended complaint also raises some  
2 substantial factual issues on some of the claims.<sup>18</sup> Thus, Plaintiffs’ claims are not purely legal.  
3 The most obvious example is Plaintiffs’ fourth claim, under the dormant Commerce Clause. As  
4 Plaintiffs allege it, the challenged proposed regulatory amendments violate the dormant  
5 Commerce Clause “[b]ecause the burden on interstate commerce of the regulation . . . is  
6 excessive in relation to its local benefits.” (FAC ¶ 137.) This issue is “one of degree,” often  
7 involving the application of a balancing test. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142  
8 (1970). Thus, as alleged, this claim is a factual – not legal – claim, requiring the Court to  
9 analyze the burdens and benefits, both separately and in comparison. *See Pacific Northwest*  
10 *Venison Producers v. Smitch*, 20 F.3d 1008, 1014-17 (9th Cir. 1994) (searching for evidence to  
11 support plaintiffs’ position on summary judgment on a dormant Commerce Clause claim).  
12 Factual issues also exist in the implied preemption claim in the first claim (preemption under the  
13 Energy Policy and Conservation Act): Plaintiffs assert, in part, that the proposed regulatory  
14 amendments will frustrate congressional objectives by limiting consumer choice and adversely  
15 affecting motor vehicle safety. (FAC ¶¶ 44, 76-77, 89-92.) However, for Plaintiffs to succeed,  
16 they must show that any conflict is irreconcilable – and preemption is found “only to the extent  
17 necessary.” *See Chevron U.S.A., Inc. v. Hammond*, 726 F.2d 483, 495-96 (9th Cir. 1984)  
18 (quotation marks and citations omitted). Thus, the Court will need to decide whether these  
19 alleged effects actually exist and whether they really will be caused by these proposed regulatory  
20 amendments. Lastly, factual issues also exist in the fifth claim (preemption under the federal  
21 antitrust laws), because Plaintiffs claim that these proposed regulatory amendments require  
22 automobile manufacturers to join together to illegally coordinate production, supply, and price  
23 information. (FAC ¶ 143.) Such a claim is likely viewed through a “rule of reason” lens: “an  
24 inquiry into market power and market structure designed to assess the combination’s actual  
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27 18. In their amended complaint, Plaintiffs added boilerplate allegations stating that  
28 their claims raise “purely or predominantly a legal question.” (*Compare* FAC ¶¶ 117, 124, 131,  
137, and 143 *with* Complaint ¶¶ 93, 100, 107, 113, and 119.) However, again, such an allegation  
stating a legal conclusion does not bind the Court. *See Warren*, 328 F.3d at 1139.

1 effect.”<sup>19</sup> *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). This  
2 inquiry – as well as the inquiry of whether such illegal coordination would actually occur –  
3 would, of course, be factual, not legal. Thus, parts of Plaintiffs’ first claim and Plaintiffs’ fourth  
4 and fifth claims involve substantial factual issues.

5           The parties and the Court would be well served to not address these issues now.<sup>20</sup>  
6 Plaintiffs’ theory in this case is that these proposed motor vehicle emission regulatory  
7 amendments act as fuel economy standards, and impose a burden beyond that set by federal fuel  
8 economy standards. (*See, e.g.*, FAC ¶ 77.) While defendant Witherspoon does not agree with  
9 this view, all of the factual issues necessary for Plaintiffs to make their case will be affected by  
10 what the federal fuel economy standards will actually be for model years 2009 and afterwards  
11 (the model years affected by the challenged proposed regulatory amendments). Without  
12 knowing those standards, for example, Plaintiffs cannot show how much of an added burden the  
13 challenged proposed regulatory amendments will impose. The problem with deciding this case  
14 now is simple: it is unknown what those federal fuel economy standards will be for those model  
15 years. Federal regulations setting fuel economy standards for light duty trucks – which Plaintiffs  
16 seem to focus on (*see* FAC ¶¶ 11, 14-29) – do not *exist* for model years beyond model year 2007.  
17 *See* 49 C.F.R. § 533.5(a) (Table IV). Federal passenger automobile fuel economy standards are  
18 currently set by statute at a default of 27.5 miles per gallon, but they could be revised to a  
19 “maximum feasible” level for any of these future model years. *See* 49 U.S.C. § 32902(b), (c).  
20 The federal agency responsible for making this determination acknowledged recently that “a  
21 more stringent fuel economy standard than 27.5 mpg might better represent the ‘maximum  
22 feasible’ level for the passenger car fleet.” *See* Reforming the Automobile Fuel Economy

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25           19. In fact, Plaintiffs’ amended complaint admits that manufacturers need not be  
26 completely disconnected from each other. (*See* FAC ¶ 83 (discussing potential “joint ventures or  
27 other arrangements to share resources”).)

28           20. While the basic foundation for this motion is that Plaintiffs brought this motion  
before the proposed regulatory amendments were final, and therefore a few months too soon, the  
factual nature of some of Plaintiffs’ claims raises the question of whether these factual claims  
will be ripe any time soon. The Court need not reach this question, now, however, to dismiss or  
stay this case at this time.

1 Standards Program, 68 Fed. Reg. 74908, 74909 n.2 (2003). This is not surprising, given that that  
2 federal agency was barred from making any such determination for model years 1996 to 2004.  
3 *See id.* at 74909 & n.2. At this point, it would only be speculation to say what California’s  
4 requirements would be in relation to these future federal standards (in model year 2009 and  
5 beyond). Since the factual issues at play in this case – as alleged by Plaintiffs – depend on the  
6 answer to that question, it makes no sense for this Court to decide those factual issues. They are  
7 not ripe for review.

8 **D. There Is No Significant Hardship to Plaintiffs If**  
9 **this Case Is Delayed a Few Months.**

10 The second question under *Abbott Laboratories* involves an evaluation of the  
11 hardship to the parties of withholding consideration. *See* 387 U.S. at 149. Any such hardship  
12 must be immediate, direct, and significant. *Anchorage*, 980 F.2d at 1326. Possible financial loss  
13 is not enough. *Id.* (citing *Chavez v. Director, Office of Workers Comp. Programs*, 961 F.2d  
14 1409, 1415 (9th Cir. 1992)).

15 On their face, the proposed regulatory amendments (even if final) will not be  
16 enforced for some time. These proposed regulatory amendments would not be effective until at  
17 least January 1, 2006. (*See* FAC, Exh. A, at 3; RJN, Exh. D, Att. I, at 13 (§ 1961.1(g)).) They  
18 would not apply until model year 2009, at the earliest. (*See* RJN, Exh. C, at A-7 (§  
19 1961.1(a)(1)(A) (table)).) And the maximum greenhouse gas emission levels set by these  
20 proposed regulatory amendments could not be enforced until 2014, at the earliest, because the  
21 proposed regulatory amendments would allow for automobile manufacturers to “equalize” their  
22 compliance over five years and by purchasing credits from other automobile manufacturers (and  
23 explicitly state that no cause of action for penalties would accrue until that five year period  
24 ends).<sup>21</sup> (*See* RJN, Exh. C, at A-15 (§ 1961.1(b)) & Exh. D, Att. I, at 10 (§ 1961.1(b)(3)(A)).)

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25  
26 21. Plaintiffs allege that the Air Resources Board requires automobile manufacturers  
27 to demonstrate compliance with Air Resources Board regulations in advance of placing motor  
28 vehicles of a particular model year for sale in California. (FAC ¶¶ 97-99.) However, any such  
demonstration would have to be consistent with the applicable regulations. For these proposed  
greenhouse gas emission standards, that demonstration would be on a fleet average basis, and  
would take into account that automobile manufacturers are able to “equalize” their compliance

1           In their amended complaint, Plaintiffs have added numerous allegations  
2 attempting to show the hardship they will face soon, justifying bringing this action now. (*See*  
3 FAC ¶¶ 97-107.) None of these allegations, however, show *any* immediate hardship to the car  
4 dealer plaintiffs or the members of plaintiff Tulare County Farm Bureau. Any effects on these  
5 Plaintiffs will not possibly occur until model year 2009 motor vehicles are sold. Any hardship  
6 justifying bringing this action now is only applicable to the manufacturer plaintiffs.

7           In alleging this hardship, Plaintiffs misunderstand the applicable inquiry, for at  
8 least three reasons: (1) because the proposed regulatory amendments are not yet final, the Court  
9 need not even consider Plaintiffs’ hardship; (2) enforcement of these proposed regulatory  
10 amendments will not occur for a very long time, and in the interim period several steps will  
11 occur, any of which might eliminate or lessen the burden caused by these proposed regulatory  
12 amendments; and (3) the question is whether Plaintiffs will suffer a hardship in waiting just  
13 several months, not until the proposed regulatory amendments would be enforced. The  
14 following discussion will explain each of these in turn.

15           As discussed above, *Abbott Laboratories* sets forth a two part test for ripeness.  
16 But since there is no final regulation – and therefore the issues are not fit for review – there is no  
17 need to reach the second part of the test, whether any alleged hardship might occur: “Under the  
18 ripeness doctrine, an agency must have taken ‘final’ action before judicial review is  
19 appropriate.” *Mt. Adams Veneer Co.*, 896 F.2d at 343. This is consistent with *Abbott*  
20 *Laboratories*, which permitted access to the courts “[w]here the legal issue presented is fit for  
21 judicial resolution, *and* where a regulation requires an immediate and significant change in the  
22 plaintiffs’ conduct.” 387 U.S. at 153 (emphasis added). *See also Ernst & Young v. Depositors*  
23 *Economic Prot. Corp.*, 45 F.3d 530, 535 (1st Cir. 1995) (“In line with the majority view, we hold  
24 that both prongs of the test ordinarily must be satisfied in order to establish ripeness.”). *But see*  
25 *Anchorage*, 980 F.2d at 1323 (“[R]ipeness will prevent review if the systemic interest in  
26 postponing adjudication due to lack of fitness outweighs the hardship on the parties created by  
27 postponement.” (quoting *Chavez*, 961 F.2d at 1414)). In fact, in *Association of American*

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over five years.

1 *Medical Colleges*, the Ninth Circuit characterized the second part of the test – the hardship  
2 question – as an exception to the general rule against pre-enforcement challenges, and ruled that  
3 the hardship question was not applicable because the challenged practice was “not a final rule.”  
4 217 F.3d at 783. The same is true here.

5           Even if the Court considers the automobile manufacturers’ hardship in  
6 considering ripeness, the true nature of that hardship and the timing of when that hardship will  
7 occur is substantially uncertain. Even after final action is taken by defendant Witherspoon and  
8 California’s Office of Administrative Law, there are several intervening events that might occur  
9 that might eliminate or lessen any effect caused by the proposed regulatory amendments. These  
10 potential events make speculative any hardship the manufacturer plaintiffs allege:

- 11       ● By setting an effective date into the future, the California Legislature explicitly  
12       granted itself “time to review these regulations and determine whether further  
13       legislation should be enacted prior to the effective date of the regulations.” Cal.  
14       Health & Safety Code § 43018.5(b)(1). The Legislature is required to “hold at  
15       least one public hearing to review the regulations.” *Id.* § 43018.5(b)(2)(B). Thus,  
16       it is entirely conceivable that the California Legislature will take some action to  
17       modify, approve, or disapprove the proposed regulatory amendments.
- 18       ● These proposed regulatory amendments will need to be reviewed and approved by  
19       US EPA, assuming that a waiver is required under Clean Air Act section 209(b).  
20       *See generally MEMA III*, 142 F.3d 449; *MEMA I*, 627 F.2d 1095. Plaintiffs  
21       acknowledge this. (*See* Complaint ¶ 46 (“California is permitted to regulate new  
22       motor vehicle emissions, provided that it receives a waiver of federal Clean Air  
23       Act preemption from [US] EPA.”).) If a new waiver is required, it is generally  
24       acknowledged that these proposed regulatory amendments cannot be enforced  
25       (that is, are not effective) until that waiver is granted. And US EPA has, in the  
26       past, granted a waiver in such a way as to delay its effective date, to provide for  
27       more lead time for the manufacturers. *See* California State Motor Vehicle  
28       Pollution Control Standards – Waiver of Federal Preemption, 40 Fed. Reg. 30311

1 (1975) (denying waiver for model year 1977, but granting waiver for succeeding  
2 years). At this point, it is unknown whether a new waiver is required. If a new  
3 waiver is required, it is also unknown when and how US EPA will act on that  
4 waiver request, and thus when these proposed regulatory amendments will be  
5 effective and able to be enforced.

- 6 ● Lastly, Plaintiffs’ theory in this case is that these proposed regulatory  
7 amendments act as fuel economy standards, and impose a burden beyond that set  
8 by federal fuel economy standards. (*See, e.g.*, FAC ¶ 77.) As discussed above, it  
9 is unknown what the federal fuel economy standards will be for the relevant  
10 model years: Federal regulations setting fuel economy standards for light duty  
11 trucks do not exist for those model years, and those for passenger automobiles  
12 may be revised to a “maximum feasible” level. (*See supra* Section II.C.) It  
13 would only be speculation to say what California’s requirements would be in  
14 relation to these future federal standards (in model year 2009 and beyond), and  
15 therefore what hardship these California proposed regulatory amendments would  
16 impose.

17 While the Court cannot measure the possibility of any of these intervening events, it is Plaintiffs’  
18 burden to show their case is ripe. Each of these uncertainties make any hardship the  
19 manufacturer plaintiffs allege speculative.

20 Despite the fact that enforcement of these proposed regulatory amendments will  
21 not occur for some time – and there are multiple intervening events that might affect this case –  
22 defendant Witherspoon is not, with this motion, asking the Court to determine that Plaintiffs’  
23 challenge would not be ripe until she takes enforcement action against a particular automobile  
24 manufacturer. Instead, the point is that Plaintiffs’ challenge is not ripe right now, and that  
25 Plaintiffs should wait until the proposed regulatory amendments are final and the *Commonwealth*  
26 *of Massachusetts* case is decided. That is only a few months from now. Thus, if the hardship  
27 inquiry on ripeness is considered, the question is limited to whether such a delay – most likely

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1 stay this litigation until the appropriate time. *See Landis v. North Am. Co.*, 299 U.S. 248, 254  
2 (1936) (“the power to stay proceedings is incidental to the power inherent in every court to  
3 control the disposition of the causes on its docket with economy of time and effort for itself, for  
4 counsel, and for litigants”). This approach would eliminate the burden on the parties and this  
5 Court until the proper time. And this would only place this litigation on hold for several months  
6 – probably until September of this year, at the latest. There will still be adequate time for  
7 Plaintiffs to seek relief before the end of the year, when the proposed regulatory amendments  
8 may become effective.

### 9 III.

#### 10 THE PRIMARY JURISDICTION DOCTRINE CALLS FOR 11 DISMISSAL OF PLAINTIFFS’ SECOND CLAIM.

12 The primary jurisdiction doctrine requires a court to refrain from answering a  
13 question that Congress has committed to an administrative agency. *United States v. General*  
14 *Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987). Here, the question raised by Plaintiffs’  
15 second claim – whether the proposed regulatory amendments are preempted by the Clean Air  
16 Act – is specifically entrusted to the Administrator of US EPA, with any review by the U.S.  
17 Court of Appeals. *See* 42 U.S.C. §§ 7543(b)(1), 7607(b)(1). This Court should dismiss the  
18 second claim.

19 “Primary jurisdiction is a doctrine of common law, wholly court-made, that is  
20 designed to guide a court in determining whether and when it should refrain from or postpone  
21 the exercise of its own jurisdiction so that an agency may first answer some question  
22 presented.” *Rilling v. Burlington N. R.R.*, 909 F.2d 399, 401 (9th Cir. 1990) (quoting 4 K.  
23 Davis, *Administrative Law Treatise* 81 (2d ed. 1983)). The doctrine prevents “judicial intrusion  
24 into the administrative domain.” *Arrow Transp. Co. v. Southern Ry.*, 372 U.S. 658, 670 (1963).  
25 “The doctrine is applicable in federal courts when an action ‘requires the resolution of issues  
26 which, under a regulatory scheme, have been placed within the special competence of an  
27 administrative body.’” *United States v. Yellow Freight Sys., Inc.*, 762 F.2d 737, 739 (9th  
28 Cir.1985) (quoting *United States v. Western Pac. R.R.*, 352 U.S. 59, 64 (1956)). These issues

1 can be legal, as well as factual. *See Western Pac. R.R.*, 352 U.S. 59.

2           The basic question is whether Congress intended that the administrative agency  
3 “have the first word” on a particular issue. *General Dynamics Corp.*, 828 F.2d at 1362. The  
4 Ninth Circuit has identified four factors relevant to this inquiry: “(1) the need to resolve an issue  
5 that (2) has been placed by Congress within the jurisdiction of an administrative body having  
6 regulatory authority (3) pursuant to a statute that subjects an industry or activity to a  
7 comprehensive regulatory scheme that (4) requires expertise or uniformity in administration.”  
8 *Id.* The Ninth Circuit has applied the primary jurisdiction doctrine to protect the administrative  
9 processes of US EPA under the Clean Air Act. *See Kennecott Copper Corp. v. Costle*, 572 F.2d  
10 1349, 1357 (9th Cir. 1978) (barring suit against US EPA regarding propriety of state  
11 implementation plan provision while same issue was being administratively considered by US  
12 EPA).

13           One additional indication of the applicability of the primary jurisdiction doctrine  
14 is whether Congress specifically directed how decisions would be reviewed under a particular  
15 statutory provision. Thus, in *Arrow Transportation*, the Supreme Court found that the issue  
16 there – the reasonableness of certain rail rates – had been “limited to carefully defined statutory  
17 avenues for review.” 372 U.S. at 670. Not applying the primary jurisdiction doctrine “would  
18 permit a single judge to pass before final [agency] action upon the question of reasonableness of  
19 a rate, which the statute expressly entrusts only to a court of three judges reviewing the  
20 [agency]’s completed task.” *Id.* at 671.

21           If the primary jurisdiction doctrine applies, a suit is proper only after the agency  
22 has made its own determination. *Rilling*, 909 F.2d at 401. While the primary jurisdiction  
23 doctrine does not affect the Court’s jurisdiction, the proper disposition, depending on the  
24 circumstances, is to either dismiss the case (or an individual claim) or to stay it. *See Reiter v.*  
25 *Cooper*, 507 U.S. 258, 268-69 & n.3 (1993).

26           Plaintiffs’ second claim alleges that: (1) “regulation of carbon dioxide and  
27 greenhouse gases to address global climate change is not authorized by section 202(a) of the  
28 Clean Air Act”; and (2) this “precludes California from adopting any new motor vehicle

1 emission standards for carbon dioxide or greenhouse gases.” (FAC ¶ 123. *See also* FAC ¶¶ 50-  
2 51.) In their original complaint, Plaintiffs more clearly admitted that the issue is whether this  
3 would prevent “the regulation approved by CARB in Resolution 04-28 from receiving a waiver  
4 of federal Clean Air Act preemption under section 209(b) of the Clean Air Act.” (Complaint ¶  
5 99. *See also* Complaint ¶¶ 46-47.)

6           However, this question is explicitly committed to the Administrator of US EPA.  
7 Section 209(b)(1) of the Clean Air Act sets forth the scope and process for California’s waivers:

8           The Administrator shall, after notice and opportunity for public hearing, waive  
9 application of this section to any State which has adopted standards (other than  
10 crankcase emission standards) for the control of emissions from new motor  
11 vehicles or new motor vehicle engines prior to March 30, 1966, if the State  
determines that the State standards will be, in the aggregate, at least as protective  
of public health and welfare as applicable Federal standards. No such waiver  
shall be granted if the Administrator finds that—

12           (A) the determination of the State is arbitrary and capricious,

13           (B) such State does not need such State standards to meet compelling and  
14 extraordinary conditions, or

15           (C) such State standards and accompanying enforcement procedures are  
not consistent with section 7521(a) of this title.

16 42 U.S.C. § 7543(b)(1). Thus, it is the Administrator that decides, based on these criteria,  
17 whether a waiver of preemption should or should not issue.

18           Importantly, the Administrator’s discretion is significantly circumscribed. For  
19 example, California’s regulations “are presumed to satisfy the waiver requirements and . . . the  
20 burden of proving otherwise is on whoever attacks them.” *MEMA I*, 627 F.2d at 1121.  
21 California is given the “broadest possible discretion.” *Id.* at 1128. And “[t]he agency’s  
22 longstanding interpretation [has been] that section 209(b) does not require California to establish  
23 perfect compliance with” the Clean Air Act. *MEMA III*, 142 F.3d at 463. Thus, on at least the  
24 “protectiveness” question, the Administrator

25           is not to overturn California’s judgment lightly. Nor is he to substitute his  
26 judgment for that of the State. There must be clear and compelling evidence that  
27 the State acted unreasonably in evaluating the relative risks of various pollutants  
in light of the air quality, topography, photochemistry, and climate in that State,  
before the EPA may deny a waiver.

28 H.R. Rep. No. 95-294, at 302 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1381. And US

1 EPA has consistently interpreted the consistency requirement to be limited to the factual  
2 question of whether “there is inadequate lead time to permit the development of the necessary  
3 technology given the cost of compliance within that time period or the Federal and State test  
4 procedures impose inconsistent certification requirements.” *See, e.g.*, California State Motor  
5 Vehicle Pollution Control Standards; Waiver of Federal Preemption, Decision, 57 Fed. Reg.  
6 24788, 24789 (1992). *See also MEMA III*, 142 F.3d at 463 (stating that “[n]either the court nor  
7 the agency has ever interpreted compliance with section 202(a) to require more” than this).

8           In addition, Congress has specifically designed how these decisions are to be  
9 reviewed by the courts. Review of any final action by the Administrator must be in either the  
10 U.S. Court of Appeals for the District of Columbia Circuit or, if the final action is “locally or  
11 regionally applicable,” in the appropriate U.S. Court of Appeals. 42 U.S.C. § 7607(b)(1). That  
12 judicial review is also circumscribed to whether the Administrator acted arbitrarily or  
13 capriciously, or not consistent with law. *MEMA I*, 627 F.2d at 1105-06. And that judicial  
14 review is based solely on an administrative record. *See id.* at 1105 & n.18, 1120, 1122, 1124-27  
15 (repeated references to the record). Lastly, the District of Columbia Circuit has explained that  
16 the Administrator’s construction of the Clean Air Act is given deference because of his agency’s  
17 “technical expertise.” *Id.* at 1106.

18           Plaintiffs are attempting to avoid this administrative waiver process. They seek a  
19 declaration from this Court that California cannot meet the waiver requirements of Clean Air Act  
20 section 209(b) because these proposed regulatory amendments would be inconsistent with  
21 Section 202 of the Clean Air Act. Congress has specifically entrusted that decision to the  
22 Administrator of US EPA, with direct appeal (on an administrative record) to the U.S. Court of  
23 Appeals. This Court need not – and should not – insert itself into that process, risking the  
24 possibility that two courts might reach inconsistent decisions on that question. Rather, the Court  
25 should apply the primary jurisdiction doctrine.

26           Defendant Witherspoon believes a dismissal is appropriate for this second claim,<sup>23</sup>

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28           23. While *Reiter* speaks of a dismissal without prejudice, it has in mind a claim  
coming back to the same court after being reviewed by the administrative agency. *See* 507 U.S.  
Mem. P. & A. in Supp. of Defendant’s Mtn. to Dismiss Plaintiffs’ First Am. Compl.           No. CIV F-04-6663 REC LJO

1 rather than a stay. Even if US EPA were to decide a waiver application in a prompt way, any  
2 challenge to that decision is not proper in this Court. Jurisdiction on that issue would be vested  
3 in the appropriate U.S. Court of Appeals.

4 **CONCLUSION**

5 For these reasons, defendant Witherspoon respectfully requests that the Court  
6 either dismiss this case in its entirety; or: (1) transfer this case to the Sacramento Division; (2)  
7 stay this litigation until California's Office of Administrative Law has approved these proposed  
8 regulatory amendments and the U.S. Court of Appeals for the District of Columbia Circuit has  
9 decided the *Commonwealth of Massachusetts* case; and (3) dismiss the second claim. With these  
10 orders, this challenge will occur at the proper place and at the proper time.

11 Dated: March 7, 2005

12 Respectfully submitted,

13 **BILL LOCKYER**  
14 Attorney General of the State of California

15 /s/ Marc N. Melnick

16 **MARC N. MELNICK**  
17 Deputy Attorney General  
18 Attorneys for Defendant

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26 at 268-69 & n.3. Here, Plaintiffs' second claim will never be properly before this Court, but is  
27 only proper in a petition for review challenging US EPA's decision on a waiver, filed in the U.S.  
28 Court of Appeals. *See* 42 U.S.C. § 7607(b)(1). Thus, a dismissal without prejudice is not  
appropriate. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001)  
(explaining that a dismissal without prejudice allows a party to come back to the same court with  
the same claim). Dismissal of the second claim should with prejudice.